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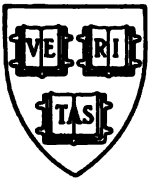

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MASSACHUSETTS REPORTS

209

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MAY 1911—SEPTEMBER 1911

HENRY WALTON SWIFT

REPORTER

BOSTON
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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. MARCUS PERRIN KNOWLTON, CHIEF JUSTICE.
HON. JAMES MADISON MORTON.
HON. JOHN WILKES HAMMOND.
HON. WILLIAM CALEB LORING.
HON. HENRY KING BRALEY.
HON. HENRY NEWTON SHELDON.
HON. ARTHUR PRENTICE RUGG.

ATTORNEY GENERAL

HON. JAMES MARCUS SWIFT.

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TABLE

OF THE CASES REPORTED.

Albee *v.* Boston Elevated Railway 6
American Express Co. (McKahan *v.*) 270
American Importing & Transportation Co. (Banes Steamship Co. *v.*) 96
American Spirits Manuf. Co. *v.* Eldridge 590
American Surety Co. (Wakefield *v.*) 173
Amiot (Rivard *v.*) 227
Anderson *v.* Smith 52
Ashley *v.* Winkley 509
Atlas Shoe Co. *v.* Bloom . . 563
Attorney General *v.* Rafferty 321
——— *v.* Stone 186

Baker (Williams *v.*) 92
Bancroft (Riverbank Improvement Co. *v.*) 217
Banes Steamship Co. *v.* American Importing & Transportation Co. 96
Bangs *v.* Farr 339
Barnett *v.* Rosenberg . . . 421
Batt *v.* Treasurer & Receiver General 319
Baxter *v.* Treasurer & Receiver General 459
Berdos *v.* Tremont & Suffolk Mills 489
Berenson *v.* Butcher . . . 208
Berry *v.* Newton & Boston Street Railway 100
Best Baking Co. (George G. Fox Co. *v.*) 251
Bigelow Carpet Co. *v.* Wiggin 542
Bigwood *v.* Boston & Northern Street Railway 345
Bloom (Atlas Shoe Co. *v.*) . . 563
Boott Mills (D'Almeida *v.*) . 81
Boston (Phillips *v.*) 329
——— (Watson *v.*) 18
Boston & Maine Railroad (D'Almeida *v.*) 81
——— (Hooker *v.*) 598
——— (Myers *v.*) 55
——— (O'Brien *v.*) 65
Boston & Northern Street Railway (Bigwood *v.*) 345
——— (Butterfield *v.*) . . . 345
Boston & Providence Railroad (Cornell-Andrews Smelting Co. *v.*) 298
Boston Bar Association *v.* Scott 200
Boston Elevated Railway (Albee *v.*) 6
——— (Cokinos *v.*) 225
——— (Connors *v.*) 60
——— (De Angelo *v.*) . . . 58
——— (Keating *v.*) 278
——— (Kinsley *v.*) 467
——— (Magner *v.*) 60
——— (Mullen *v.*) 79
——— (O'Leary *v.*) 62
——— (Ryan *v.*) 292
——— (Torrey *v.*) 43
Boston White Cross Milk Co. (Commonwealth *v.*) . . . 30
Bourke (Sanger *v.*) 481

Digitized by Google

Bourne *v.* Whitman 155
Brigham (Shawmut Commercial Paper Co. *v.*) 199
Brown *v.* Brown 388
——— *v.* Newburyport . . 259
Bryne *v.* Bryne 179
Buckley *v.* Dow Portable Electric Co. 152
Butcher (Berenson *v.*) . . . 208
Butterfield *v.* Boston & Northern Street Railway . . . 345

Cassidy (Commonwealth *v.*) . 24
Chandler (Malden & Melrose Gas Light Co. *v.*) 354
Clarke (Weld *v.*) 9
Clem (Crosby *v.*) 193
Cokinos *v.* Boston Elevated Railway 225
Commonwealth *v.* Boston White Cross Milk Co. . . 30
——— *v.* Cassidy 24
——— *v.* Graustein & Co. . 38
——— *v.* Phelps 396
Conners *v.* Lowell 111
Connors *v.* Boston Elevated Railway 60
Converse *v.* United Shoe Machinery Co. 539
Copeland *v.* Eaton 139
Coram *v.* Davis 229
Cornell-Andrews Smelting Co. *v.* Boston & Providence Railroad 298
Cotting *v.* Murray 133
County of Middlesex (Evans *v.*) 474
Cox *v.* Savage 501
Crosby *v.* Clem 193
Cushing (Noyes *v.*) 123

D'Almeida *v.* Boott Mills . . 81
——— *v.* Boston & Maine Railroad 81
Daly *v.* Foss 470
Davis (Coram *v.*) 229
—— (Newburyport *v.*) . . 126
—— *v.* Whitman 155
De Angelo *v.* Boston Elevated Railway 58
Dedham & Franklin Street Railway (Selectmen of Westwood *v.*) 213
Dow Portable Electric Co. (Buckley *v.*) 152
Dowd *v.* Tighe 464
Dwyer *v.* New York, New Haven, & Hartford Railroad 419

Eaton (Copeland *v.*) 139
Edison Electric Illuminating Co. (Lydon *v.*) 529
Eldridge (American Spirits Manuf. Co. *v.*) 590
Ellis *v.* Small 147
Equitable Trust Co. *v.* Kelsey 416
Evans *v.* County of Middlesex 474

Farr (Bangs *v.*) 339
Fisk Rubber Co. (Lynch *v.*) . 16
Forbes *v.* Thorpe 570
Foss (Daly *v.*) 470
Friebe (State Street Trust Co. *v.*) 373
Friend (George G. Fox Co. *v.*) 251

Gately *v.* Kappler 426
George G. Fox Co. *v.* Best Baking Co. 251
——— *v.* Friend 251
Graustein & Co. (Commonwealth *v.*) 38
Grebenstein *v.* Stone & Webster Engineering Co. . . 196
Grueby (Winnisimmet Co. *v.*) 1

Hall *v.* Hall 350
H. C. Dexter Chair Co. (Ridenour *v.*) 70
Henry Wood's Sons Co. (Worcester Color Co. *v.*) . 105
Hinckley (Pope *v.*) 323
Hinds *v.* Steere 442
Hodgens *v.* Sullivan 533
Hooker *v.* Boston & Maine Railroad 598
Hunneman *v.* Lowell Institution for Savings 368
Hyde Park (Nickerson *v.*) . . 365

Johnson (Montgomery Ward & Co. *v.*) 89
——— *v.* Norcross Brothers Co. 445
Jones (Lavin *v.*) 8

Digitized by Google

Kappler (Gately *v.*) 426
Keating *v.* Boston Elevated Railway 278
Kelly (Wall *v.*) 370
Kelsey (Equitable Trust Co. *v.*) 416
Kinsley *v.* Boston Elevated Railway 467

Lavin *v.* Jones 8
Leahy *v.* Street Commissioners 316
Lougee *v.* Wilkie 184
Lowell (Conners *v.*) 111
——— (Walsh *v.*) 111
Lowell Institution for Savings (Hunneman *v.*) 368
Lydon *v.* Edison Electric Illuminating Co. 529
Lynch *v.* Fisk Rubber Co. . 16

McKahan *v.* American Express Co. 270
Magner *v.* Boston Elevated Railway 60
Malden & Melrose Gas Light Co. *v.* Chandler 354
Marston *v.* Phipps 552
Metropolitan Park Commissioners, In re, petitioners . 381
Middleborough (Putnam *v.*) 456
Monahan *v.* William W. Babcock Co. 13
Montgomery Ward & Co. *v.* Johnson 89
Mullen *v.* Boston Elevated Railway 79
Murphy (Robinson *v.*) . . . 295
Murray (Cotting *v.*) . . . 133
Myers *v.* Boston & Maine Railroad 55

Newburyport (Brown *v.*) . . 259
——— *v.* Davis 126
New England Foundation Co. *v.* Reed 556
New England Home for Deaf Mutes, Aged, Blind and Infirm (Peoples National Bank of Boston *v.*) 48
Newton & Boston Street Railway (Berry *v.*) 100
New York, New Haven, & Hartford Railroad (Dwyer *v.*) 419
Nickerson *v.* Hyde Park . . 365
Norcross Brothers Co. (Johnson *v.*) 445
North Anson Lumber Co. *v.* Smith 333
Noyes *v.* Cushing 123

O'Brien *v.* Boston & Maine Railroad 65
——— *v.* Union Freight Railroad 449
O'Leary *v.* Boston Elevated Railway 62
Opinion of the Justices . . 607

Paine (Parnall *v.*) 181
Parnall *v.* Paine 181
Pastene (Wenz *v.*) 359
Peoples National Bank of Boston *v.* New England Home for Deaf Mutes, Aged, Blind and Infirm 48
Phelps (Commonwealth *v.*) . 396
Phillips *v.* Boston 329
Phipps (Marston *v.*) . . . 552
Pope *v.* Hinckley 323
——— *v.* Pope 432
Putnam *v.* Middleborough . . 456

Rafferty (Attorney General *v.*) 321
Reed (New England Foundation Co. *v.*) 556
Rhines *v.* Wentworth . . . 585
——— (Wentworth *v.*) . . 585
Richards (Robinson *v.*) . . . 295
Ridenour *v.* H. C. Dexter Chair Co. 70
Rivard *v.* Amiot 227
Riverbank Improvement Co. *v.* Bancroft 217
Robinson *v.* Murphy . . . 295
——— *v.* Richards 295
Rosenberg (Barnett *v.*) . . 421
Ryan *v.* Boston Elevated Railway 292

Sanger *v.* Bourke 481
Savage (Cox *v.*) 501

Digitized by Google

Scott (Boston Bar Association v.) 200
Selectmen of Westwood v. Dedham & Franklin Street Railway 213
Shawmut Commercial Paper Co. v. Brigham 199
Small (Ellis v.) 147
Smith (Anderson v.) 52
——— (North Anson Lumber Co. v.) 333
State Street Trust Co. v. Friebe 373
——— v. Treasurer & Receiver General 373
Steere (Hinds v.) 442
Stone (Attorney General v.) 186
Stone & Webster Engineering Co. (Grebenstein v.) . . . 196
Street Commissioners (Leahy v.) 316
Sullivan (Hodgens v.) . . . 533

Thorpe (Forbes v.) 570
Tighe (Dowd v.) 464
Torrey v. Boston Elevated Railway 43
Treasurer & Receiver General (Batt v.) 319
——— (Baxter v.) 459
——— (State Street Trust Co. v.) 373
Tremont & Suffolk Mills (Berdos v.) 489

Union Freight Railroad (O'Brien v.) 449
United Shoe Machinery Co. (Converse v.) 539

Wakefield v. American Surety Co. 173
Wall v. Kelly 370
Walsh v. Lowell 111
Watson v. Boston 18
Weld v. Clarke 9
Wells v. Wells 282
Wentworth v. Rhines . . . 585
——— (Rhines v.) 585
Wenz v. Pastene 359
Westwood, Selectmen of, v. Dedham & Franklin Street Railway 213
Whitman (Bourne v.) . . . 155
——— (Davis v.) 155
Wiggin (Bigelow Carpet Co. v.) 542
Wilde v. Wilde 205
Wilkie (Lougee v.) 184
William W. Babcock Co. (Monahan v.) 13
Williams v. Baker 92
Winkley (Ashley v.) . . . 509
Winnisimmet Co. v. Grueby . 1
Worcester Color Co. v. Henry Wood's Sons Co. 105

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TABLE OF CASES

CITED BY THE COURT.

Abbott *v.* Hapgood, 150 Mass. 248 337
——— *v.* Middleton, 7 H. L. Cas. 68 487
——— *v.* North Andover, 145 Mass. 484 267
Adams, petitioner, 165 Mass. 497 884
——— *v.* County of Essex, 205 Mass. 189 269
——— *v.* Cuddy, 13 Pick. 460 862
——— *v.* Young, 200 Mass. 588 562
Agawam National Bank *v.* South Hadley, 128 Mass. 503 264
Aldrich *v.* Anchor Coal Co. 24 Ore. 32 597
Allen *v.* Allen, 100 Mass. 373 289
——— *v.* Boston, 137 Mass. 319 311
——— *v.* Fairbanks, 45 Fed. Rep. 445 597
Allwright *v.* Skillings, 188 Mass. 538 569
Alvord *v.* Collin, 20 Pick. 418 12
American Bell Telephone Co. *v.* National Improved Telephone Co. 27 Fed. Rep. 663 12
American Car & Foundry Co. *v.* Armentraut, 214 Ill. 509 499 n.
American Circular Loom Co. *v.* Wilson, 198 Mass. 182 395
American Tube Works *v.* Tucker, 185 Mass. 236 79
Amos *v.* Oakley, 131 Mass. 413 276
Anderson *v.* Metropolitan Stock Exchange, 191 Mass. 117 176
Andover *v.* Grafton, 7 N. H. 298 267
Andrews *v.* Tuttle-Smith Co. 191 Mass. 461 248, 525
Anshen *v.* Boston Elevated Railway, 205 Mass. 32 469
Antoni *v.* Belknap, 102 Mass. 198 311
Appleton *v.* O'Donnell, 173 Mass. 398 481
Armour Packing Co. *v.* United States, 209 U. S. 56 603
Arthur *v.* Texas & Pacific Railway, 204 U. S. 505 601
Ashcroft *v.* Butterworth, 186 Mass. 511 91
Atherton *v.* Emerson, 199 Mass. 199 395
Atkins *v.* Atkins, 195 Mass. 124 195
Atkinson *v.* Newcastle & Gateshead Waterworks Co. 2 Ex. D. 441 498
——— *v.* Newton, 169 Mass. 240 831
Atlantic National Bank *v.* Tavener, 180 Mass. 407 195
Attorney General *v.* American Legion of Honor, 206 Mass. 158 581
——— *v.* McCabe, 172 Mass. 417 267
——— *v.* Parker, 126 Mass. 216 248
——— *v.* Stone, 209 Mass. 186 322
Auditor General *v.* Hutchinson, 113 Mich. 245 119

Bachant *v.* Boston & Maine Railroad, 187 Mass. 392 550
Badger *v.* Holmes, 6 Gray, 118 395
Bagley *v.* Wonderland Co. 205 Mass. 238 498
Baker *v.* Portland, 58 Maine, 199 168
Baldwin *v.* Barney, 12 R. I. 392 168
Balfour *v.* Hopkins, 93 Fed. Rep. 564 364
Balian & Sons *v.* Joly, Victoria, & Co. 6 T. L. R. 345 274
Ballard *v.* Demmon, 156 Mass. 449 548
Baltimore & Ohio Railroad *v.* United States, 215 U. S. 481 608
Bancroft *v.* Curtis, 108 Mass. 47 431
Bannon *v.* Angier, 2 Allen, 128 139
Barber *v.* Barber, 21 How. 582 290
Barnes *v.* Haynes, 13 Gray, 188 547
Bartlett *v.* Boston, 182 Mass. 460 332
——— *v.* Slater, 182 Mass. 206 192
Bass *v.* Edwards, 126 Mass. 445 78
Bassett *v.* Harwich, 180 Mass. 585 549
Batchelor *v.* Fortescue, 11 Q. B. D. 474 452
Bates *v.* Boston Elevated Railway, 187 Mass. 328 307
——— *v.* Willard, 10 Met. 62 869
Baxter *v.* Coughlin, 70 Minn. 1 493
Baylies *v.* Payson, 5 Allen, 473 246
Beacon Trust Co. *v.* Souther, 188 Mass. 413 338
Beale *v.* Old Colony Street Railway, 196 Mass. 119 103, 469

Digitized by Google

Bearse v. Mabie, 198 Mass. 451 596
Beckwith v. Philby, 6 B. & C. 635 404
Beghold v. Auto Body Co. 149 Mich. 14 499
Bell v. Newton, 188 Mass. 481 332
Belleveau v. S. C. Lowe Supply Co. 200 Mass. 237 500
Bemis v. Boston, 14 Allen, 366 457
——— v. Wilder, 100 Mass. 416 150
Benedictus v. Sullivan, Powell & Co. 12 R. P. C. 25 259
Benoit v. Conway, 10 Allen, 528 267
Benson v. Monson & Brimfield Manuf. Co. 9 Met. 562 43
Bernard v. Adams Express Co. 205 Mass. 254 601
Bernheimer v. Converse, 206 U. S. 516 596
Berry v. Wasserman, 179 Mass. 537 372
Bevard v. Lincoln Traction Co. 74 Neb. 802 349
Bickford v. Page, 2 Mass. 455 94
Biggs v. Dagnall, [1895] 1 Q. B. 207 578
Billings v. Mann, 156 Mass. 203 394
Birdsall v. Clark, 73 N. Y. 73 267
Blackwell v. Old Colony Railroad, 122 Mass. 21 421
Blair v. Waco, 75 Fed. Rep. 800 267
Blake v. Everett, 1 Allen, 248 547
Blanchard v. Tyler, 12 Mich. 339 363
Blinn v. Dame, 207 Mass. 169 207
Bloomfield v. Charter Oak Bank, 121 U. S. 121 264
Blount v. Wheeler, 199 Mass. 330 461
Bolch v. Smith, 7 H. & N. 737 452
Bolivar Manuf. Co. v. Neponset Manuf. Co. 16 Pick. 241 549
Boone v. Chiles, 9 Pet. 187 363
Borden v. Jenks, 140 Mass. 562 439
Borell v. Dann, 2 Hare, 440 379
Boston v. Robbins, 121 Mass. 458 304
——— v. Turner, 201 Mass. 190 110, 581
Boston & Lowell Railroad v. Salem & Lowell Railroad, 2 Gray, 1 23
Boston & Maine Railroad v. State, 75 N. H. 513 190
Boston Bar Association v. Casey, 196 Mass. 100 203
——— v. Greenhood, 168 Mass. 169 203
Boston Electric Co. v. Cambridge, 163 Mass. 64 269
Boston Safe Deposit & Trust Co. v. Buffum, 186 Mass. 242 487
——— v. Coffin, 152 Mass. 92 486
Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232 88
Bourne v. Whitman, 209 Mass. 155 493
Bowie v. Coffin Valve Co. 200 Mass. 571 228
Bowler v. Pacific Mills, 200 Mass. 364 454
Boyden v. Hill, 198 Mass. 477 581
——— v. Massachusetts Mutual Life Ins. Co. 153 Mass. 544 208
Brainard v. Fowler, 119 Mass. 262 201
Brandeis v. Atkins, 204 Mass. 471 462
Brandreth, Matter of, 169 N. Y. 437 378
Bray v. Kettell, 1 Allen, 80 247
Brigham v. Fayerweather, 140 Mass. 411 12
——— v. ———, 144 Mass. 48 394
Brinkerhoff v. Brown, 6 Johns. Ch. 139 248
Brisbin v. Boston Elevated Railway, 207 Mass. 553 469
Brittain v. West End Street Railway, 168 Mass. 10 154
Broadway National Bank v. Baker, 176 Mass. 294 596
Bromberg v. Evans Laundry Co. 134 Iowa, 38 499
Brooks v. West Springfield, 193 Mass. 190 379, 457
Broomfield v. Sheehan, 190 Mass. 585 199
Broschart v. Tuttle, 59 Conn. 1 168
Brown v. Cunard Steamship Co. 147 Mass 58 601
——— v. Eastern Railroad, 11 Cush. 97 600
——— v. Fales, 139 Mass. 21 247
——— v. Kellogg, 182 Mass. 297 555
——— v. State, 33 Vroom, 666 414
——— v. Wentworth, 181 Mass. 49 116
——— v. Woodbury, 188 Mass. 279 276
Buchanan v. Litchfield, 102 U. S. 278 264
Buckland v. Adams Express Co. 97 Mass. 124 601
Buell v. County of Worcester, 119 Mass. 372 190
Buffington v. Maxam, 152 Mass. 477 486
Bullard v. Moor, 158 Mass. 418 394
Burk v. Schreiber, 183 Mass. 35 364
Burke v. Big Sandy Coal & Coke Co. 68 W. Va. 421 499
——— v. Burke, 170 Mass. 499 12
——— v. Davis, 191 Mass. 20 496
Burnett v. Smith, 4 Gray, 50 78
Burt v. Merchants' Ins. Co. 115 Mass. 1 305
Busiere v. Reilly, 189 Mass. 518 394
Butchers' Slaughtering & Melting Association v. Commonwealth, 163 Mass. 386 190
Butler v. Ives, 139 Mass. 202 195
——— v. New York, New Haven, & Hartford Railroad, 177 Mass. 191 467
——— v. Stark, 139 Mass. 19 122
Butler's estate, In re, 105 Fed. Rep. 549 246
Byrne v. Boston Elevated Railway, 198 Mass. 444 62

Cabot v. Haskins, 3 Pick. 83 567
Cahen v. Brewster, 203 U. S. 543 191
Caldwell v. Nash, 190 Mass. 507 195
Callaghan v. Boston Elevated Railway, 200 Mass. 450 62
——— v. O'Brien, 186 Mass. 378 364

Digitized by Google

Calvert v. London Dock Co. 2 Keen, 638 177
Canning v. Farquhar, 16 Q. B. D. 727 91
Carney v. A. B. Clark Co. 207 Mass. 200 54
Carpenter v. Fisher, 175 Mass. 9 78
Carroll v. Carroll, 188 Mass. 558 395
——— v. New York, New Haven, & Hartford Railroad, 182 Mass. 237 197
Carver v. Hayes, 47 Maine, 257 180
Cary v. Holmes, 16 Gray, 127 597
Casperson v. Michaels, 142 Ky. 314 500
Cassidy v. Shimmin, 122 Mass. 406 248
Casteel v. Pittsburg Vitrified Paving & Building Brick Co. 83 Kans. 533 500
Cau v. Texas & Pacific Railway, 194 U. S. 427 601
Cavanagh v. Block, 192 Mass. 63 554
Caverly v. Simpson, 132 Mass. 462 394
Cecil v. Cecil, 19 Md. 72 12
Central Mills v. Stewart, 133 Mass. 461 372
Charland v. Home for Aged Women, 204 Mass. 563 116, 368
Chase v. Boston, 193 Mass. 522 458
——— v. Chase, 132 Mass. 473 588
——— v. New York Central & Hudson River Railroad, 208 Mass. 187 169
Chelmsford v. Demarest, 7 Gray, 1 130
Chenery v. Fitchburg Railroad, 160 Mass. 211 454
Chicago v. McCoy, 136 Ill. 344 119
Chicago, Burlington & Quincy Railway v. United States, 220 U. S. 559 495
Chicago, Milwaukee & St. Paul Railway v. Solan, 169 U. S. 133 605
Child v. Child, 185 Mass. 376 487
Childs v. Barrows, 9 Met. 413 369
Chmiel v. Thorndike Co. 182 Mass. 112 60
Choate v. Arrington, 116 Mass. 552 132
Christmas v. Russell, 14 Wall. 69 246
Cincinnati v. Bickett, 26 Ohio St. 49 119
Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission, 162 U. S. 184 602
Ciriack v. Merchants' Woolen Co. 151 Mass. 152 494
Citizens' Savings Bank v. Newburyport, 169 Fed. Rep. 766 132, 268
City Bank v. Luckie, L. R. 5 Ch. 773 245
Claflin v. Boston & Albany Railroad, 157 Mass. 489 547
Clare v. Hatch, 180 Mass. 194 581
Clark v. Seagraves, 186 Mass. 430 562
——— v. Swift, 3 Met. 390 96
Clarke v. Second National Bank, 177 Mass. 257 344
Cleaveland v. Draper, 194 Mass. 118 247
Coates v. Burton, 191 Mass. 180 488
Cochrane v. Commonwealth, 175 Mass. 299 314
Coffee v. New York, New Haven, & Hartford Railroad, 155 Mass. 21 87
Coffin v. Nantucket, 5 Cush. 269 267
Cohasset v. Moors, 204 Mass. 178 548
Cohen v. Hamblin & Russell Manuf. Co. 186 Mass. 544 496
——— v. Longarini, 207 Mass. 556 481
Colbert v. Daniel, 32 Ala. 314 248
Cole v. Bates, 186 Mass. 584 358
Coleman v. Lowell, Lawrence & Haverhill Street Railway, 181 Mass. 591 80
Commercial Mutual Ins. Co. v. Boston Advertising Co. 188 Mass. 348 43
——— v. McLoon, 14 Allen, 351 248
Commonwealth v. Boston & Lowell Railroad, 184 Mass. 211 495
——— v. Boston & Worcester Railroad, 11 Cush. 512 43
——— v. Carey, 12 Cush. 246 404, 410
——— v. Churchill, 5 Mass. 174 111
——— v. Coy, 157 Mass. 200 41
——— v. Edgerly, 10 Allen, 184 405
——— v. Gee, 6 Cush. 174 414
——— v. Gordon, 159 Mass. 8 36
——— v. Graustein & Co. 209 Mass. 38 203
——— v. Maletsky, 203 Mass. 241 266
——— v. Mixer, 207 Mass. 141 42
——— v. New York Central & Hudson River Railroad, 206 Mass. 417 48
——— v. Poisson, 157 Mass. 510 414
——— v. Smith, 141 Mass. 185 266
——— v. Staples, 191 Mass. 384 266
——— v. Thompson, 159 Mass. 56 414
——— v. Thornton, 14 Gray, 41 41
——— v. Warner, 178 Mass. 541 414
Como v. Worcester, 177 Mass. 543 190, 317
Connolly v. Booth, 198 Mass. 577 227
Conroy v. Smith Iron Co. 194 Mass. 468 88
Constable v. National Steamship Co. 154 U. S. 51 278
Converse v. Ayer, 197 Mass. 443 596
——— v. Nichols, 202 Mass. 270 596
——— v. United Shoe Machinery Co. 185 Mass. 422 540
Cook v. Gowan, 15 Gray, 237 100
——— v. Smith, 101 Mass. 341 485
Cook, In re estate of, 187 N. Y. 253 464
Cooper v. Joel, 1 DeG., F. & J. 240 568
Copeland v. Boston Dairy Co. 184 Mass. 207 86
——— v. ——— 189 Mass. 342 86
Cormo v. Boston Bridge Works, 205 Mass. 366 86
Cornell-Andrews Smelting Co. v. Boston & Providence Railroad, 202 Mass. 585 300
Corrigan v. Union Sugar Refinery, 98 Mass. 577 456
Costello v. Crowell, 133 Mass. 352 560
Counter v. Couch, 8 Allen, 436 169, 497

Digitized by Google

County Commissioners, petitioners, 143 Mass. 424 217
Cowan v. Hallack, 9 Col. 572 180
Cowles v. Dickinson, 140 Mass. 373 370
Cox v. Central Vermont Railway, 170 Mass. 129 600
Craft v. South Boston Railroad, 150 Mass. 207 50, 269
Creavin v. Newton Street Railway, 176 Mass. 529 80
Crimmins v. Booth, 202 Mass. 17 497
Crippen v. Dexter, 13 Gray, 330 247
Crocker v. Shaw, 174 Mass. 266 190, 378
Crocket v. Lee, 7 Wheat. 522 358
Crosby v. Fitch, 12 Conn. 410 273
Cunningham v. Pell, 5 Paige, 607 529
Curtis v. Portland, 59 Maine, 483 267
Cutter v. Hamlen, 147 Mass. 471 282

Dahlin v. Walsh, 192 Mass. 163 493
Dallinger v. Rapello, 14 Fed. Rep. 32 457
Dalm v. Bryant Paper Co 157 Mich. 550 499
Daly v. Foss, 199 Mass. 104 126
Damon v. Scituate, 119 Mass. 66 168
Daniels v. Hudson River Fire Ins. Co. 12 Cush. 416 207
Darsam v. Kohlmann, 123 La. 164 498
Dary v. Gran, 190 Mass. 482 487
David v. Britannic Merthyr Coal Co. [1909] 2 K. B. 146 493
Daviess County v Dickinson, 117 U. S. 657 264
Davis v. Garrett, 6 Bing. 716 273
——— v. John L. Whiting & Son Co. 201 Mass. 91 167, 500
——— v. Russell, 5 Bing. 354 404
Davis & Sons v. Taff Vale Railway, [1895] A. C. 542 493
Davis' estate, In re, 27 Mont. 490 245
Dawes v. Shed, 15 Mass. 6 569
Day v. Green, 4 Cush. 433 267
—— v. Highland Street Railway, 135 Mass. 113 168
—— v. McLea, 22 Q. B. D. 610 109
Dean v. American Legion of Honor, 156 Mass. 435 581
——— v. Anderson, 7 Stew. 496 863
Dedham Institution for Savings v. Slack, 6 Cush. 408 50
Deerfield v. Connecticut River Railroad, 144 Mass. 325 549
Degnan v. Farr, 126 Mass. 297 195
De Las Casas, petitioner, 178 Mass. 213 884
———, 180 Mass. 471 884
Delk v. St. Louis & San Francisco Railroad, 220 U. S. 580 498
Demott v. Stockton Paper Ware Manuf. Co. 5 Stew. 124 245
Denver & Rio Grande Railway v. Norgate, 72 C. C. A. 365 498
Dever, Ex parte, 14 Q. B. D. 611 245
Dexter v. Inches, 147 Mass. 324 488
Dickinson v. Conway, 12 Allen, 487 267
Dilger v. Commonwealth, 88 Ky. 550 414
Dillon v. Barnard, 21 Wall. 430 246
Dingley v. Boston, 100 Mass. 544 3
Doane v. Preston, 183 Mass. 569 250
Doe v. Boston & Worcester Street Railway, 195 Mass. 168 87
Doherty v. Boston & Northern Street Railway, 207 Mass. 27 103
Donald v. American National Bank, 25 Mont. 456 246
Donohue v. Woodbury, 6 Cush. 148 78
Donovan v. Bernhard, 208 Mass. 181 18
Dorr v. Tremont National Bank, 128 Mass. 349 551
Dow v. Clark, 7 Gray, 198 581
Downes v. Elmira Bridge Co. 179 N. Y. 136 453
Drake v. Taylor, 203 Mass. 528 555
Drennan v. Andrew, L. R. 1 Ch. 300 578
Drew v. Beard, 107 Mass. 64 358
Driscoll v. Fall River, 168 Mass. 105 197
——— v. West End Street Railway, 159 Mass. 142 80
Drury v. Midland Railroad, 127 Mass. 571 305
Dudley v. Northampton Street Railway, 204 Mass. 443 168, 496
Dugan v. Vattier, 3 Blackf. 245 363
Dugle v. State, 100 Ind. 259 222
Dunham v. Indianapolis & St. Louis Railroad, 7 Biss. 223 144
Dunlap v. O'Bannon, 5 B. Mon. 393 245
Dunphy v. Traveller Newspaper Association, 146 Mass. 495 248
Dunseth v. Wade, 2 Scam. 285 273
Dwight v. County Commissioners, 7 Cush. 533 305

Eagle Fire Ins. Co. v. Pell, 2 Edw. Ch. 631 418
Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 289 110 n.
Edge Moor Bridge Works v. Bristol, 170 Mass. 528 91
Edmands v. Boston, 108 Mass. 535 304
Electric Welding Co. v. Prince, 195 Mass. 242 596
Elliott v. Hayden, 104 Mass. 180 12, 555
Ellis v. Felt, 206 Mass. 472 426
—— v. Welch, 6 Mass. 246 302
Elmore v. Symonds, 183 Mass. 321 245
Emery v. Boston Terminal Co. 178 Mass. 172 305
Emmons v. Shaw, 171 Mass. 410 878
Epes' case, 5 Gratt. 676 415
Erdman v. Deer River Lumber Co. 104 C. C. A. 482 498
E. Remington & Sons v. Samana Bay Co. 140 Mass. 494 596
Erlund v. Manning, 160 Mass. 444 472
Eustis v. Boston Elevated Railway, 206 Mass. 143 81

Digitized by Google

Evans v. American Iron & Tube Co. 42 Fed. Rep. 519 499
——— v. Beattie, 5 Esp. 26 569
——— v. Foss, 194 Mass. 513 126
Evensen v. Lexington & Boston Street Railway, 187 Mass. 77 102
Everson v. General Accident, Fire & Life Assurance Co. 202 Mass. 169 268
Everts v. Agnes, 4 Wis. 343 363
Ewer v. Hobbs, 5 Met. 1 364
Exchange Bank v. Rice, 107 Mass. 37 581

Fairbanks v. Mayor & Aldermen of Fitchburg, 132 Mass. 42 217
Farmer v. Ward, 5 Buch. 33 418
Farnsworth v. Childs, 4 Mass. 637 362
Farnum v. Farnum, 13 Gray, 508 405
Farr v. Rouillard, 172 Mass. 303 131, 372
Farrell v. Sturtevant Co. 194 Mass. 431 168
Faulk v. Columbia, Newberry & Laurens Railroad, 82 S. C. 369 601
Faulkner v. Boston & Maine Railroad, 187 Mass. 254 349
Fay v. Haven 3 Met. 109 458
Federhen v. Smith, 3 Allen, 119 111
Feeley v. Melrose, 205 Mass. 329 172
Feeney v. York Manuf. Co. 189 Mass. 336 86
Feneff v. Boston & Maine Railroad, 196 Mass. 175 87
Ferry v. Campbell, 110 Iowa, 290 191
Field v. Gowdy, 199 Mass. 568 555
Fielder & Turley v. Adams Express Co. 69 W. Va. 138 606
Finnegan v. Winslow Skate Manuf. Co. 189 Mass. 580 499
Finnick v. Boston & Northern Street Railway, 190 Mass. 382 80, 108
Fisher, In re, 98 Fed. Rep. 89 150
——— v. Cushman, 103 Fed. Rep. 860 150
——— v. Doe, 204 Mass. 34 176
Fitchburg Railroad v. Page, 131 Mass. 391 548
Fitzgerald v. Boston & Albany Railroad, 156 Mass. 293 154
——— v. Boston Elevated Railway, 194 Mass. 242 469
——— v. Connecticut River Paper Co. 155 Mass. 155 497
Fitzsimmons v. Johnson, 90 Tenn. 416 290
Flagg Manuf. Co. v. Holway, 178 Mass. 83 257
Flash v. Conn, 109 U. S. 371 597
Fleischer v. Rentchler, 17 Ill. App. 402 596
Fleming v. Elston, 171 Mass. 187 154
Fletcher v. Morey, 2 Story, 555 246
Floyer v. Bankes, 3 DeG., J. & S. 306 380
Flynn v. Butler, 189 Mass. 377 87
——— v. Flynn, 183 Mass. 365 589

Flynt v. Arnold, 2 Met. 619 363
Fogg v. Price, 145 Mass. 518 249
Foote v. Cotting, 195 Mass. 55 269, 358
Forbes v. Douglass, 175 Mass. 191 394
——— v. Harrington, 171 Mass. 386 181
Foster v. Bailey, 157 Mass. 160 589
——— v. Morse, 132 Mass. 354 611
——— v. New York, New Haven, & Hartford Railroad, 187 Mass. 21 86
——— v. Park Commissioners, 133 Mass. 321 317
Fourth Street Bank v. Yardley, 165 U. S. 634 246
Francis Wright, The, 105 U. S. 381 100
Freedley v. French, 154 Mass. 339 567
French v. Sabin, 202 Mass. 240 533
Friedman, In re, 164 Fed. Rep. 181 562
Frost v. Gage, 1 Allen, 262 581
Fuller v. Linzee, 135 Mass. 468 208
——— v. Mayor & Aldermen of Springfield, 123 Mass. 289 317
——— v. New York Fire Ins. Co. 184 Mass. 12 177

Gaines Leathers v. Blackwell Durham Tobacco Co. 144 N. C. 330 499
Galbraith v. West End Street Railway, 165 Mass. 572 102
Galeano v. Boston, 195 Mass. 64 304
Galligan v. Leonard, 204 Mass. 202 266
——— v. Old Colony Railroad, 182 Mass. 211 444
Galveston, Houston & Henderson Railroad v. Allison, 59 Texas, 193 273
Gannett v. Albree, 103 Mass. 372 150
Garant v. Cashman, 188 Mass. 13 532
Gardiner v. New York Central & Hudson River Railroad, 201 N. Y. 387 601
Gardner v. Boston Elevated Railway, 204 Mass. 213 444
Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co. 199 Mass. 22 550
Gaussen v. United States, 97 U. S. 584 217
Gaynor v. Old Colony & Newport Railroad, 100 Mass. 208 87, 103
Gebhard v. Eastman & Gibson, 7 Minn. 56 596
Gelsthorpe v. Furnell, 20 Mont. 299 191
George G. Fox Co. v. Glynn, 191 Mass. 344 255
——— v. Hathaway, 199 Mass. 99 255
Georgia Railroad v. Cole, 68 Ga. 623 273
Gibson v. Dunkerley Brothers, 102 L. T. Rep. 587 493
——— v. Soper, 6 Gray, 279 394
Gleason v. McKay, 134 Mass. 419 580
Glynn v. Central Railroad, 175 Mass. 510 88
Goldsborough v. Turner, 67 N. C. 408 363
Goodrich v. Thompson, 44 N. Y. 324 273

Digitized by Google

Goshen National Bank v. Bingham, 118 N. Y. 349 363
Gould v. Hartley, 187 Mass. 561 569
Graham v. King, 50 Mo. 22 119
——— v. Middleby, 185 Mass. 349 359
Grand Trunk Railway v. Fitzgerald, 5 Canada, S. C. 204 274
Graves, In re estate of, 242 Ill. 212 464
——— v. Adams Express Co. 176 Mass. 280 600
——— v. Corbin, 132 Mass. 571 248
——— v. Lake Shore & Michigan Southern Railroad, 137 Mass. 33 601
Gray v. Cambridge, 189 Mass. 405 549
Grebenstein v. Stone & Webster Engineering Corp. 205 Mass. 481 196
Green v. Gaskill, 175 Mass. 265 589
——— v. Kemp, 13 Mass. 515 11
Greenfield Savings Bank v. Simons, 133 Mass. 415 357
Greenwood v. Greenwood, 5 Ch. D. 954 487
Gregg v. Wyman, 4 Cush. 322 168
Gregory v. Wilson, 9 Hare, 683 150
Gribble v. Raymond Vau Pragg Supply Co. 124 App. Div. (N. Y.) 829 109
Griffin v. Boston, 188 Mass. 475 293
Griffiths v. London & North Western Railway, 14 L. T. (N. S.) 797 452
Grimstone v. Carter, 3 Paige, 421 362
Grove v. Rentch, 26 Md. 367 358
Groves v. Wimborne, [1898] 2 Q. B. D. 402 493
Gulf, Colorado & Santa Fe Railway v. Hefley, 158 U. S. 98 602
Gunnison County Commissioners v. Rollins, 173 U. S. 255 267
Gurney v. Ford, 2 Allen, 576 358
——— v. Tenney, 197 Mass. 457 560

Hager v. Cleveland, 86 Md. 476 596
Hale v. New York, New Haven, & Hartford Railroad, 190 Mass. 84 88
Hall v. Bliss, 118 Mass. 554 364
—— v. Corcoran, 107 Mass. 251 168
—— v. Ripley, 119 Mass. 135 169
Hamma v. Haverhill Gas Light Co. 203 Mass. 572 533
Hancock National Bank v. Ellis, 166 Mass. 414 596
——— v. ——— 172 Mass. 39 597
Hand v. Baynes, 4 Whart. 204 273
Handy v. Bliss, 204 Mass. 518 178, 479
Hankins v. Reimers, 86 Neb. 307 500
Hanks v. Boston & Albany Railroad, 147 Mass. 495 454
Harback v. Boston, 10 Cush. 295 2
Harding v. Handy, 11 Wheat. 103 358
Hardy v. Martin, 200 Mass. 548 395
Hare v. Marsh, 61 Wis. 435 296
Harmon v. Clark, 13 Gray, 114 582
Harmony National Bank's Appeal, 101 Penn. St. 428 245
Harper v. Dewey, 191 Mass. 411 479
Harrington v. Worcester, 6 Allen, 576 12, 116
Harris v. Starkey, 176 Mass. 445 247
Hart v. Pennsylvania Railroad, 112 U. S. 331 601
Hasbrouck v. New York Central & Hudson River Railroad, 202 N. Y. 363 606
Haskell v. Equitable Life Assurance Society, 181 Mass. 341 204
Hastings v. Nesmith, 188 Mass. 190 462
——— v. Pepper, 11 Pick. 41 274
Hatch v. Boston & Northern Street Railway, 205 Mass. 410 102, 281, 470
——— v. Dana, 101 U. S. 205 596
Haughwout v. Murphy, 7 C. E. Green, 531 363
Hawkes v. Lackey, 207 Mass. 424 250
Hayden v. Stone, 112 Mass. 346 548
Hayes v. Hall, 188 Mass. 510 527
——— v. Michigan Central Railroad, 111 U. S. 228 167
Haynes v. Boston Elevated Railway, 204 Mass. 249 227, 469
Heinlein v. Boston & Providence Railroad, 147 Mass. 136 454
Henderson v. Foster, 182 Mass. 447 424
——— v. Stevenson, L. R. 2 H. L. (Sc.) 470 601
Hennessey v. Taylor, 189 Mass. 583 8, 17, 62, 80, 103
Herbeck-Demer Co. v. Baltimore & Ohio Railroad, 17 Interst. Com. Rep. 88 601
Hey v. Prime, 197 Mass. 474 282
Hicks v. New York, New Haven, & Hartford Railroad, 164 Mass. 424 164
Hill v. Boston, Hoosac Tunnel, & Western Railroad, 144 Mass. 284 601
—— v. Mayor of Boston, 193 Mass. 569 250, 266
Hills v. Barnard, 152 Mass. 67 488
Hinckley v. Cape Cod Railroad, 120 Mass. 257 104
Hitchcock v. Aldermen of Springfield, 121 Mass. 382 318
Hoadley v. County Commissioners, 105 Mass. 519 580
Hodges v. Thayer, 110 Mass. 286 96
Hoffman v. Holt, 186 Mass. 572 154
Holder v. Hillson, 170 Mass. 466 250
Holian v. Boston Elevated Railway, 194 Mass. 74 8
Holland v. Cruft, 3 Gray, 162 307
Holmes v. Holmes, 194 Mass. 552 589
——— v. Winchester, 133 Mass. 140 195
Homer v. Skelton, 2 Met. 194 588
Honeyman v. Marryatt, 6 H. L. Cas. 112 578
Hood v. Boardman, 148 Mass. 330 487
Hook v. Bolton, 199 Mass. 244 286
Hooper v. Bradbury, 133 Mass. 303 588
Hoover v. Donally, 3 Hen. & M. 316 363
Hopper v. Covington, 118 U. S. 148 264

Digitized by Google

Horne v. Boston Elevated Railway, 206 Mass. 231 533
Horsman v. Brockton & Plymouth Street Railway, 205 Mass. 519 102
Hostetter v. Park, 137 U. S. 30 273
Howard's estate, In re, 80 Vt. 489 191
Howe v. Lawrence, 9 Cush. 553 582
Howes v. Colburn, 165 Mass. 385 395
Howland v. Howland, 100 Mass. 222 588
——— v. Leach, 11 Pick. 151 247
——— v. Union Street Railway, 150 Mass. 86 62, 108
Hudson v. Miles, 185 Mass. 582 131
Hughes v. Pennsylvania Railroad, 202 Penn. St. 222 601
Hull v. Johnson & Co. 22 R. I. 66 109
Hunneman v. Lowell Institution for Savings, 205 Mass. 441 307, 369
——— v. Phelps, 207 Mass. 439 369
Hunnewell v. Taber, 2 Sprague, 1 274
Hunt v. Boston Elevated Railway, 201 Mass. 182 349
——— v. Old Colony Street Railway, 206 Mass. 11 8, 62
——— v. Perry, 165 Mass. 287 457
Hurlbut v. Kantzler, 112 Ill. 482 150
Hussey v. Arnold, 185 Mass. 202 247
——— v. Cross, 53 S. W. Rep. 986 109
Hynes v. Brewer, 194 Mass. 435 556
Hyslop v. Boston & Maine Railroad, 208 Mass. 362 177

Illinois Car & Equipment Co. v. Linstroth Wagon Co. 112 Fed. Rep. 737 177
Ingalls v. Ingalls, 150 Mass. 57 472
Ingersoll v. Coram, 211 U. S. 335 244
——— v. ———, 127 Fed. Rep. 418 245
Ingraham v. Boston & Northern Street Railway, 207 Mass. 451 467
Inland Steel Co. v. Yedinak, 172 Ind. 423 499
Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway, 167 U. S. 479 602
——— v. Delaware, Lackawanna & Western Railroad, 220 U. S. 235 602
Iron & Wire Co. v. Green, 108 Tenn. 161 498
Ives v. South Buffalo Railroad, 201 N. Y. 271 610

Jackson v. Jackson, 153 Mass. 374 488
——— v. Knowlton, 173 Mass. 94 404
Jacobson v. Merrill & Ring Mill Co. 107 Minn. 74 499
Jaehnig v. J. G. & B. S. Ferguson Co. 197 Mass. 364 466
James v. American Surety Co. 133 Ky. 313 191
Jameson v. Boston Elevated Railway, 193 Mass. 560 349
Jaquith v. Davenport, 191 Mass. 415 344
——— v. Morrill, 204 Mass. 181 291
Jeddrey v. Boston & Northern Street Railway, 198 Mass. 282 80
Jeffries v. Jeffries, 117 Mass. 184 364
Jenkins v. Weston, 200 Mass. 488 395
Jennings v. Rooney, 183 Mass. 577 359
Jewett v. West Somerville Co-operative Bank, 178 Mass. 54 50
John v. Connell, 71 Neb. 10 119
John Hood Co. v. American Pneumatic Service Co. 191 Mass. 27 600
Johnson v. Irasburgh, 47 Vt. 28 168
——— v. Wilmarth, 18 Met. 416 568
Johnston & Toronto Type Foundry Co. v. Consumers' Gas Co. of Toronto, [1896] A. C. 447 494
Jones v. Boston & Northern Street Railway, 205 Mass. 108 495
——— v. Gane, 205 Mass. 87 487
——— v. Sisson, 5 Gray, 288 78
——— v. Wolcott, 15 Gray, 541 78
Jordan v. Westerman, 62 Mich. 170 289
Joseph v. George C. Whitney Co. 177 Mass. 176 154
Joseph Thorley, Limited v. Orchis Steamship Co. [1907] 1 K. B. 660 278
Judson v. Western Railroad, 6 Allen, 486 601
June v. Boston & Albany Railroad, 153 Mass. 79 454

Kaiser v. Alexander, 144 Mass. 71 569
Keady v. People, 32 Col. 57 414
Kearney v. Boston & Worcester Railroad, 9 Cush. 108 282
Keating v. Smith, 5 Cush. 282 486
Keefe v. Lexington & Boston Street Railway, 185 Mass. 183 215
Kelley v. Barton, 174 Mass. 396 332
——— v. Calumet Woolen Co. 177 Mass. 128 496
Kelly v. Killian, 133 Ill. App. 102 595
Kenady v. Lawrence, 128 Mass. 318 197
Kennedy v. Welch, 196 Mass. 592 357
Kent v. Garvin, 1 Gray, 148 569
—— v. Waite, 10 Pick. 138 549
Kernitz v. Long Island City, 50 Hun, 428 119
Kerr v. Boston Elevated Railway, 188 Mass. 434 62
Kerr's estate, 159 Penn. St. 512 464
Ketchum v. St. Louis, 101 U. S. 306 246
Kidder v. Dunstable, 11 Gray, 342 169
Kiff v. Roberts, 33 Ch. D. 265 578
Kilbourn v. Sunderland, 130 U. S. 505 357
Kimball v. Huntington, 10 Wend. 675 180
Kingman v. Spurr, 7 Pick. 235 580
Kingman, petitioner, 153 Mass. 566 384
———, 156 Mass. 361 384
———, 170 Mass. 112 384
Kirby v. Boylston Market Association, 11 Gray, 249 498
Kirchgassner v. Rodick, 170 Mass. 543 395

Digitized by Google

Kirkham v. Wheeler-Osgood Co. 89 Wash. 415 499
Knapp v. Abell, 10 Allen, 485 291
——— v. Knapp, 134 Mass. 353 288
Knickerbocker Life Ins. Co. v. Weitz, 99 Mass. 157 208
Koester v. Rochester Candy Works, 194 N. Y. 92 499 n.
Kohl v. United States, 91 U. S. 367 110
Koplan v. Boston Gas Light Co. 177 Mass. 15 87
Koppel v. Massachusetts Brick Co. 192 Mass. 223 337
Krauser v. McCurdy, 174 Penn. St. 174 110 n.
Kupiec v. Warren, Brookfield & Spencer Street Railway, 196 Mass. 468 349

Lacy v. State Treasurer, 121 N. W. Rep. 179 192
Ladd v. New York, New Haven, & Hartford Railroad, 193 Mass. 359 88
Laing v. Rigney, 160 U. S. 531 290
Lake County v. Graham, 130 U. S. 674 267
Lamb v. Pierce, 113 Mass. 72 363
Lamson v. Knowles, 170 Mass. 295 588
Lancaster National Bank v. Taylor, 100 Mass. 18 363
Lander's, Estate of, 6 Cal. App. 744 192
Lane v. Wheatley, 1 Saund. 216 282
Langdeau v. John Hancock Mutual Life Ins. Co. 194 Mass. 56 207
Langdon v. Stewart, 142 Mass. 576 116
Larmore v. Crown Point Iron Co. 101 N. Y. 391 452
Laroe v. Sugar Loaf Dairy Co. 187 N. Y. 367 110 n.
Lathrop v. Merrill, 207 Mass. 6 487
Latta v. Chicago, St. Paul, Minneapolis & Omaha Railway, 97 C. C. A. 198 605
Lawrence v. Stratton, 6 Cush. 163 361
Leach v. Fobes, 11 Gray, 506 462
Leahy v. Street Commissioners, 209 Mass. 316 333
Leary v. Boston & Albany Railroad, 139 Mass. 580 497
Lebourdais v. Vitrified Wheel Co. 194 Mass. 341 88
Leddy v. Barney, 139 Mass. 394 567
Lee v. Kirby, 104 Mass. 420 379
—— v. Sterling Silk Manuf. Co. 134 App. Div. (N. Y.) 123 499 n.
Legard v. Hodges, 1 Ves. Jr. 478 246
Lenahan v. Pittson Coal Mining Co. 218 Penn. St. 311 499 n.
LeNeve v. LeNeve, 3 Atk. 646 363
Lent v. Padelford, 10 Mass. 230 568
Lenz v. Prescott, 144 Mass. 505 247
Lewis v. Bond, 18 Beav. 85 150
Lexington & West Cambridge Railroad v. Elwell, 8 Allen, 371 130
Libby v. Todd, 194 Mass. 507 588
Liddle v. Old Lowell National Bank, 158 Mass. 15 359
Light v. Jacobs, 183 Mass. 206 562
Lincoln v. Burrage, 177 Mass. 378 581
——— v. Erie Preserving Co. 132 Mass. 129 91
Lipsky v. Heller, 199 Mass. 310 547
Little v. Phipps, 208 Mass. 331 525
——— v. Silveira, 204 Mass. 114 487
Liverpool & Great Western Steam Co. v. Phenix Ins. Co. 129 U. S. 397 596
Lockwood v. Boston Elevated Railway, 200 Mass. 587 87
Loftus v. Jorjorian, 194 Mass. 165 178
Lonergan v. Peck, 186 Mass. 361 177
Long v. Athol, 196 Mass. 497 276, 395
Lord v. Rowse, 195 Mass. 216 76
Lord Churchill, In re, 39 Ch. D. 174 419
Loring v. Steineman, 1 Met. 204 247
Louisiana v. Wood, 102 U. S. 294 269
Louisville & Nashville Railroad v. Mottley, 219 U. S. 467 603
——— v. Venable, 132 Ga. 501 606
Louisville, New Albany & Chicago Railway v. Helm, 22 Ky. Law Rep. 964 110 n.
Loveland v. Rand, 200 Mass. 142 76
Lovell v. Farrington, 50 Maine, 239 358
Lowell Five Cents Savings Bank v. Winchester, 8 Allen, 109 267
Loze v. Mayor & Aldermen of New Orleans, 2 La. 427 119
Lyman v. Hampshire, 138 Mass. 74 197
Lynch v. Richardson, 163 Mass. 160 212
Lynde v. Lynde, 181 U. S. 183 288
——— v. ———, 162 N. Y. 405 288
——— v. Melrose, 10 Allen, 49 94
Lyons v. Desotelle, 124 Mass. 387 167

McArdle, In re, 126 Fed. Rep. 442 150
McCarragher v. Rogers, 120 N. Y. 526 495
McCarty v. Clinton Gas Light Co. 193 Mass. 76 533
McClench v. Waldron, 204 Mass. 554 488
McCoy v. Jordan, 184 Mass. 575 395
McCreary v. Boston & Maine Railroad, 153 Mass. 300 549
McCrohan v. Davison, 187 Mass. 466 8, 281, 294
McDonald v. American National Bank, 25 Mont. 456 246
MacDonald v. Edison Electric Illuminating Co. 208 Mass. 199 349, 533
McDuffee v. Hestonville, Mantua & Fairmount Passenger Railway, 162 Fed. Rep. 36 144
McGrath v. Merwin, 112 Mass. 467 168
McIlroy v. McIlroy, 208 Mass. 458 288
McIntire v. Mower, 204 Mass. 233 395
McKahan v. American Express Co. 209 Mass. 270 601
McKay v. Myers, 166 Mass. 312 110 n.
MacKeown v. Lacey, 200 Mass. 437 194

Digitized by Google

McKim v. Blake, 139 Mass. 593 569
McLean v. Richardson, 127 Mass. 339 78
McLennon v. Richardson, 15 Gray, 74 408
McNamara v. Boston & Maine Railroad, 202 Mass. 491 86, 102
——— v. Central Vermont Railroad, 202 Mass. 491 88
McNeil v. O'Brien, 204 Mass. 594 122
McPhee v. New England Structural Co. 188 Mass. 141 154
Maghee v. Camden & Amboy Railroad Transportation Co. 45 N. Y. 514 278
Maguire v. Fitchburg Railroad, 146 Mass. 379 104
Majestic, The, 166 U. S. 375 601
Malone v. Boston & Worcester Railroad, 12 Gray, 388 600
Maloney v. Hayes, 206 Mass. 1 555
Manning v. Mulrey, 192 Mass. 547 250
Manson v. Boston, 163 Mass. 479 190
Marble v. Jamesville Manuf. Co. 163 Mass. 171 372
Marino v. Lehmaier, 173 N. Y. 530 497
Marr v. Washburn & Moen Manuf. Co. 167 Mass. 35 373
Marshall v. Norcross, 191 Mass. 568 496
Martin v. D'Arcy, 8 H. L. Cas. 698 578
——— v. Pittsburgh & Lake Erie Railroad, 203 U. S. 284 605
——— v. Thison, 153 Mich. 516 289
Marvel v. Cobb, 200 Mass. 293 250
Mathers v. Green, L. R. 1 Ch. 29 144
Matter of Released Rates, In the, 13 Interst. Com. Rep. 550 601
May v. Wood, 172 Mass. 11 560
Mayer v. Mayer, 154 Mich. 386 288
Mellen v. Whipple, 1 Gray, 317 581
Melody v. Great Northern Railway, 25 So. Dak. 606 602
Menut v. Boston & Maine Railroad, 207 Mass. 12 493
Merchants' National Bank of Gardiner v. Citizens' Gas Light Co. 159 Mass. 505 50
Merrick v. Webster, 8 Mich. 268 273
Merrill v. Peaslee, 146 Mass. 460 195
Metcalf v. Framingham Parish, 128 Mass. 370 486
Metcalfe v. Cunard Steamship Co. 147 Mass. 66 454
Middlesex Manuf. Co. v. Lawrence, 1 Allen, 339 130
Millard v. Brayton, 177 Mass. 538 207
Miller v. Chicago, Burlington & Quincy Railroad, 85 Neb. 458 606
——— v. Shay, 145 Mass. 162 569
Minnesota Iron Co. v. Kline, 199 U. S. 593 610
Minot v. Purrington, 190 Mass. 386 247
——— v. Treasurer & Receiver General, 207 Mass. 588 190
——— v. Winthrop, 162 Mass. 113 190, 379
Missouri Pacific Railway v. Mackey, 127 U. S. 205 610
Mitchell v. Rome Railroad, 17 Ga. 574 180
Model Lodging House Association v. Boston, 114 Mass. 133 195
Moffatt v. Kenny, 174 Mass. 311 452
Moffitt v. Kelly, 218 U. S. 400 191
Moller, In re, 8 Bened. 526 419
Montgomery v. Gilbertson, 184 Iowa, 291 192
Montgomery Door & Sash Co. v. Atlantic Lumber Co. 206 Mass. 144 597
Mooney v. Benjamin F. Smith Co. 205 Mass. 270 154
Moore v. Duggan, 179 Mass. 153 177
Moran v. Dickinson, 204 Mass. 559 168, 495
Morgan's Co. v. Texas Central Railway, 137 U. S. 171 583
Morrow v. Superior Court, 64 Cal. 383 596
Morse v. Curtis, 140 Mass. 112 362
——— v. Street Commissioners, 197 Mass. 292 316, 331
Mortlock v. Williams, 76 Mich. 568 110 n.
Morton v. Shaw, 190 Mass. 554 296
Moseley v. Bolster, 201 Mass. 135 250
Mosher v. Murphy, 121 Mass. 276 372
Moulton v. Kershaw, 59 Wis. 316 91
Mowry v. Reed, 187 Mass. 174 428
Moxie Nerve Food Co. v. Modox Co. 153 Fed. Rep. 487 259
Mulvey v. Boston, 197 Mass. 178 282
Murch v. Wilson's Sons Co. 168 Mass. 408 497
Murphy v. Armstrong Transfer Co. 167 Mass. 199 17, 62, 80
——— v. Boston Elevated Railway, 204 Mass. 229 103, 281
——— v. Conway, 9 Cl. & F. 73 578
——— v. New York, New Haven, & Hartford Railroad, 187 Mass. 18 86
——— v. Russell, 202 Mass. 480 170
Muscoe v. Commonwealth, 86 Va. 448 411
Mutual Life Ins. Co. v. Allen, 138 Mass. 24 207
Myers v. Boston & Maine Railroad, 209 Mass. 55 454

Nairn v. National Biscuit Co. 120 Mo. App. 144 499
Nantz v. McPherson, 7 T. B. Mon. 597 363
Nash v. D'Arcy, 183 Mass. 30 12
Nathan v. Odgens, 93 L. T. (N. S.) 558 110 n.
——— v. ———, 94 L. T. (N. S.) 126 110 n.
National Mahaiwe Bank v. Barry, 125 Mass. 20 357
Nations v. Johnson, 24 How. 195 290

Digitized by Google

Nesbit v. Riverside Independent District, 144 Mass. 610 267
Newburyport v. Citizens' Savings Bank, 215 U. S. 598 269
Newcomb v. Boston Protective Department, 146 Mass. 596 164, 499
Newell v. Peaslee, 151 Mass. 601 458
New England Trust Co. v. Abbott, 205 Mass. 279 378
New Jersey Steam Navigation Co. v. Merchant's Bank, 6 How. 344 601
Newsome v. Newsome, L. R. 2 P. & D. 306 195
Newton v. Newton, 188 Mass. 226 2
——— v. Perry, 168 Mass. 319 3
New York Central & Hudson River Railroad v. Fraloff, 100 U. S. 24 601
New York, New Haven, & Hartford Railroad v. Blacker, 178 Mass. 386 314
——— v. Interstate Commerce Commission, 200 U. S. 361 602
Nickey v. Steuder, 164 Ind. 189 499
Nims v. Mount Hermon Boys' School, 160 Mass. 177 338
Nisbet v. Wells, 25 Ky. Law Rep. 511 212
Nixon v. Wright, 146 Mich. 231 289
Noble v. Hand, 163 Mass. 289 342
——— v. Joseph Burnett Co. 208 Mass. 75 249
Norcross v. Wyman, 187 Mass. 25 480
Norgate v. Denver & Rio Grande Railway, 202 U. S. 616 498
Norman v. Virginia-Pocahontas Coal Co. 68 W. Va. 405 499
North Baptist Church v. Orange, 25 Vroom, 111 119
Northern Bank v. Porter Township, 110 U. S. 608 264
Norton v. Eastern Railroad, 118 Mass. 366 493
——— v. Palmer, 7 Cush. 523 458
——— v. Sewall, 106 Mass. 143 282

O'Brien v. Lexington & Boston Street Railway, 205 Mass. 182 81, 103, 281
——— v. Murphy, 175 Mass. 253 130
——— v. Shea, 208 Mass. 528 497
O'Connor v. Roberts, 120 Mass. 227 55
O'Hare v. Downing, 130 Mass. 16 372
O'Neil v. O'Leary, 164 Mass. 387 54
Opinion of the Justices, 208 Mass. 603 555
Orem v. Wrightson, 51 Md. 34 419
Ormandroyd v. Fitchburg & Leominster Street Railway, 193 Mass. 130 349
Orr v. Gilman, 183 U. S. 278 191
Orthodox Congregational Society v. Greenwich, 145 Mass. 112 18
Osborn v. Carr, 12 Conn. 195 362
O'Toole v. Pruyn, 201 Mass. 126 497
Oulighan v. Butler, 189 Mass. 287 78, 87
Owen v. Neveau, 128 Mass. 427 370

Packard v. Universalist Society, 10 Met. 427 50
Page v. O'Toole, 144 Mass. 303 3
——— v. Page, 189 Mass. 85 288
Palmer v. Whitney, 166 Mass. 306 588
Paper Stock Disinfecting Co. v. Boston Disinfecting Co. 147 Mass. 318 581
Paris v. Hamburg-Bremen Fire Ins. Co. 204 Mass. 90 177
Park v. Johnson, 4 Allen, 259 150
Parker v. Boston & Hingham Steamboat Co. 109 Mass. 449 550
——— v. Simpson, 180 Mass. 334 248, 394
——— v. Tootal, 11 H. L. Cas. 143 487
Patten v. Moore, 32 N. H. 382 363
Patterson v. Boston, 23 Pick. 425 302
Pauley v. Steam Gauge & Lantern Co. 131 N. Y. 90 493
Pavitt v. Lehigh Valley Railroad, 153 Penn. St. 302 276
Peabody v. Boston & Providence Railroad, 181 Mass. 76 318
——— v. Fenton, 3 Barb. Ch. 451 362
Pegler v. Hyde Park, 176 Mass. 101 301
Pennell v. Lathrop, 191 Mass. 357 337
Penn Match Co. v. Hapgood, 141 Mass. 145 337
Pennoyer v. Neff, 95 U. S. 714 290
Pennsylvania Railroad v. Hughes, 191 U. S. 477 604
People v. Bowen, 182 N. Y. 1 43
Pepoon v. Stagg, 1 Nott & McC. 102 180
Pepper's estate, 159 Penn. St. 508 464
Perkins v. Church, 31 Barb. 84 597
——— v. Perkins, 10 Mich. 425 289
——— v. Rice, 187 Mass. 28 555
Perlstein v. American Express Co. 177 Mass. 530 163
Perry v. Tozer, 90 Minn. 431 499
Peters v. Gille Manuf. Co. 133 Mo. App. 412 499
Peterson v. Lothrop, 34 Penn. 223 12
Phillips v. Blatchford, 137 Mass. 510 580
——— v. Brigham, Kelly & Co. 26 Ga. 617 273
——— v. Cornell, 133 Mass. 546 176
——— v. Phillips, 4 DeG., F. & J. 208 363
Pierce v. Prescott, 128 Mass. 140 247, 528
Pike v. Waltham, 168 Mass. 581 177
Pinch v. Anthony, 8 Allen, 536 246
Pine v. White, 175 Mass. 585 525
Pingrey v. National Life Ins. Co. 144 Mass. 374 208
Platz v. Cohoes, 89 N. Y. 219 168
Plummer v. Boston Elevated Railway, 198 Mass. 499 469
——— v. Dill, 156 Mass. 426 452
Pollard v. Pollard, 1 Allen, 490 439
Polsey v. Newton, 199 Mass. 450 487

Digitized by Google

Pomeroy v. Bank of Indiana, 1 Wall. 23 111
Prairie State Bank v. United States, 164 U. S. 227 177
Presidio County v. Noel-Young Bond & Stock Co. 212 U. S. 58 264
Prince v. Lowell Electric Light Corp. 201 Mass. 276 87, 104, 583
Pritchard, Succession of, 118 La. 883 189
Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577 338
Proprietors of Canal Bridge v. Gordon, 1 Pick. 296 338
Proprietors of Locks & Canals v. Nashua & Lowell Railroad, 10 Cush. 385 305
Providence, Fall River & Newport Steamboat Co. v. Fall River, 187 Mass. 45 304
Publishing Co. v. Jersey City, 25 Vroom, 437 119
Purdon v. Blinn, 192 Mass. 387 288
Putnam v. Bowker, 11 Cush. 542 548
——— v. Misochi, 189 Mass. 421 596

Queen v. Dayton Coal & Iron Co. 95 Tenn. 458 498
Quinn v. Burton, 195 Mass. 277 357

Rafferty v. People, 72 Ill. 37 411
Railroad Co. v. Manufacturing Co. 16 Wall. 318 601
Railroad National Bank v. Lowell, 109 Mass. 214 269
Ralph v. Cambridge Electric Light Co. 200 Mass. 566 533
Randall, petitioner, 11 Allen, 473 203
Rapp v. Giddings, 4 So. Dak. 492 110 n.
Raymond v. Chicago Union Traction Co. 207 U. S. 20 332
Readman v. Conway, 126 Mass. 374 555
Reed v. Crapo, 127 Mass. 39 118
Reeve v. Dennett, 137 Mass. 315 204
Reid v. Wright, 181 Mass. 306 204
Removal Cases, 100 U. S. 457 246
Rhoades, In re, 190 N. Y. 525 327
Rice v. Bradford, 180 Mass. 545 320
—— v. Dewey, 13 Gray, 47 245
—— v. Dwight Manuf. Co. 2 Cush. 80 567
Richardson v. Hall, 124 Mass. 228 489
——— v. Tobin, 45 Cal. 30 119
Richardson School Fund v. Dean, 130 Mass. 242 131
Richardson, Spence & Co. v. Rowntree, [1894] A. C. 217 601
Richer v. Voyer, L. R. 5 P. C. 461 180
Ricketson v. Merrill, 148 Mass. 76 247
Riou v. Rockport Granite Co. 171 Mass. 162 154
Road in Upper Hanover, 44 Penn. St. 277 119
Robbins v. Dartmouth & Westport Street Railway, 203 Mass. 546 104
Robbins v. Springfield Street Railway, 165 Mass. 30 108
Roberts v. Taylor, 31 Ont. 10 499
——— v. Welsh, 192 Mass. 278 11, 122
Robertson v. National Steamship Co. 139 N. Y. 416 273
Robinson v. Brown, 182 Mass. 266 421
——— v. Robinson, 173 Mass. 233 395
Robinson Bros. & Gifford v. Merchants' Despatch Transportation Co. 45 Iowa, 470 278
Rockport v. Webster, 174 Mass. 385 2
Rogers v. Hosack's Executors, 18 Wend. 319 246
——— v. Lynn, 200 Mass. 354 120
——— v. Phillips, 206 Mass. 306 103
——— v. Ward, 8 Allen, 387 358
Rohan v. Sawin, 5 Cush. 281 404
Rolin v. Tobacco Co. 141 N. C. 300 499
Rose v. Fall River Five Cents Savings Bank, 165 Mass. 273 116
—— v. King, 49 Ohio St. 218 493
Rosenfeld v. Fortier, 94 Mich. 29 110 n.
Ross v. Saulsbury, Respess & Co. 52 Ga. 379 245
Rowland v. Maddock, 188 Mass. 360 527
Royal Bank of Liverpool v. Grand Junction Railroad, 125 Mass. 490 250
Ruddy v. George F. Blake Manuf. Co. 205 Mass. 172 86
Ruggles v. Nantucket, 11 Cush. 433 267

Sargent v. Eureka Spund Apparatus Co. 46 Hun, 19 363
Sarrisin v. Slater & Sons, 203 Mass. 258 154, 228
Sawyer v. Cook, 188 Mass. 163 250
Sayles v. Quinn, 196 Mass. 492 344
Scanlan v. Usher, 8 Cl. & F. 561 578
Scannell v. Boston Elevated Railway, 208 Mass. 513 204
Schendel v. Stevenson, 158 Mass. 351 341
Schlemmer v. Buffalo, Rochester & Pittsburg Railway, 205 U. S. 1 498
——— v. ———, 220 U. S. 590 498
Seaman v. Colley, 178 Mass. 478 461
Seaver v. Griffing, 176 Mass. 59 487
Seeds Grain & Hay Co. v. Conger, 83 Ohio St. 169 109
Seele v. Boston & Northern Railroad, 187 Mass. 248 281
Selectmen of Clinton v. Worcester Consolidated Street Railway, 199 Mass. 279 215
Selectmen of Norwood v. New York & New England Railroad, 161 Mass. 259 421
Selectmen of Wellesley v. Boston & Worcester Street Railway, 188 Mass. 250 215
Sharon v. Winnebago Furniture Manuf. Co. 141 Wis. 185 499
Shaw v. Silloway, 145 Mass. 503 250

Digitized by Google

Shee v. Hale, 13 Ves. 404 150
Sherburne v. Middleton, 9 Cl. & F. 72 578
——— v. Sischo, 143 Mass. 489 588
Short's Estate, 16 Penn. St. 63 191
Sibley v. Leffingwell, 8 Allen, 584 363
Silloway v. Brown, 12 Allen, 30 395
Silva v. Boston Elevated Railway, 183 Mass. 249 62, 80
Simoneau v. Rice & Hutchins, 202 Mass. 82 496
Singer Manuf. Co. v. Reynolds, 168 Mass. 588 130
Sipes v. Michigan Starch Co. 137 Mich. 258 493
Sisson v. Tate, 114 Mass. 479 395
Skilton v. Roberts, 129 Mass. 306 364
Slade v. Talbot, 182 Mass. 256 328
Slattery v. Lawrence Ice Co. 190 Mass. 79 466
——— v. North End Savings Bank, 175 Mass. 380 50
Sleat v. Fagg, 5 B. & Ald. 342 274
Sly v. Hunt, 159 Mass. 151 395
Smith v. Baker & Sons, [1891] A. C. 325 498
——— v. Boston & Maine Railroad, 120 Mass. 490 167
——— v. Boston Elevated Railway, 202 Mass. 489 62
——— v. Gardner, 11 Gray, 418 168
——— v. Gowdy, 8 Allen, 566 91
——— v. Meegan, 122 Mass. 6 372
——— v. National Coal & Iron Co. 185 Ky. 671 498
——— v. Whitney, 147 Mass. 479 311
Snow v. Boston Blank Book Manuf. Co. 158 Mass. 456 250
Solis v. Williams, 205 Mass. 350 121
Somes v. Brewer, 2 Pick. 184 379
Spencer v. Harding, L. R. 5 C. P. 561 91
Spofford v. Harlow, 3 Allen, 176 169
Spooner v. Old Colony Street Railway, 190 Mass. 132 102
——— v. Spooner, 155 Mass. 52 195
Squire v. Learned, 196 Mass. 134 150
Staples v. Dean, 114 Mass. 125 96
Stark v. Mansfield, 178 Mass. 76 307
Starnes v. Albion Manuf. Co. 147 N. C. 556 500
State v. Burns, 33 Mo. 483 415
——— v. Chamberlain, 99 Wis. 508 119
——— v. Hauser, 63 Ind. 155 267
——— v. Holcomb, 86 Mo. 371 411
Stauffer, Succession of, 119 La. 66 191
Stearns v. Janes, 12 Allen, 582 549
——— v. Stearns, 192 Mass. 144 486
Steele v. Burkhardt, 104 Mass. 59 169
Steers v. Rogers, [1893] A. C. 232 144
Stehle v. Jaeger Automatic Machine Co. 220 Penn. St. 617 499 n.
——— v. ———, 225 Penn. St. 348 499 n.
Sterling v. Union Carbide Co. 142 Mich. 284 499
Stetson v. Curtis, 119 Mass. 266 139
Stevens v. Bradford, 185 Mass. 439 188
——— v. Gaylord, 11 Mass. 256 458
Stewart v. Finkelstone, 206 Mass. 28 216
——— v. Joyce, 201 Mass. 301 297
——— v. Merchants' Despatch Transportation Co. 47 Iowa, 229 278
Stone v. Boston & Albany Railroad, 171 Mass. 536 500
Stoughton, Sharon & Canton v. Baker, 4 Mass. 522 267
Stowe v. Bowen, 99 Mass. 194 529
Stowell v. Gram, 184 Mass. 562 177
Strafford v. Republic Iron & Steel Co. 238 Ill. 371 499 n.
Stranahan v. Richardson, 75 Minn. 402 246
Stratton v. Edwards, 174 Mass. 374 428
Strong v. Carver Cotton Gin Co. 197 Mass. 53 538
Sturbridge v. Franklin, 160 Mass. 149 12
Suffolk Savings Bank v. Boston, 149 Mass. 364 363
Sullivan v. Boston Elevated Railway, 192 Mass. 37 467
——— v. Hanover Cordage Co. 222 Penn. St. 40 499 n.
——— v. India Manuf. Co. 113 Mass. 396 495
——— v. Maroney, 6 Buch. 104 208
Sumner v. Williams, 8 Mass. 162 94
Sunter v. Sunter, 190 Mass. 449 250, 894
Sutliff v. Lake County Commissioners, 147 U. S. 230 267
Sutton v. Wauwatosa, 29 Wis. 21 168
Swan v. Emerson, 129 Mass. 289 419
Syneszewski v. Schmidt, 153 Mich. 438 499

Taggard v. Piper, 118 Mass. 315 588
Tallon v. Tallon, 156 Mass. 313 589
Taylor v. Bowker, 111 U. S. 110 111
——— v. Carew Manuf. Co. 143 Mass. 470 498
——— v. Davis, 110 U. S. 330 247
——— v. Hennessey, 200 Mass. 263 496
Temple v. Phelps, 193 Mass. 297 132
Tenney v. Prince, 4 Pick. 385 567
Texas & Pacific Railway v. Abilene Cotton Oil Co. 204 U. S. 426 603
——— v. Cisco Oil Co. 204 U. S. 449 603
——— v. Mugg, 202 U. S. 242 602
Thayer v. Kinsey, 162 Mass. 232 589
——— v. Paulding, 200 Mass. 98 328
Thissell v. Schillinger, 186 Mass. 182 588
Thomas v. Boston Elevated Railway, 193 Mass. 488 349
——— v. Marshfield, 18 Pick. 240 550
——— v. Quartermaine, 18 Q. B. D. 685 497
Thompson v. Barry, 184 Mass. 429 297
——— v. Guyon, 5 Sim. 65 150
Thomson v. Ludington, 104 Mass. 193 208

Digitized by Google

Thornton v. Marginal Freight Railway, 123 Mass. 32 111
Thwing v. Great Western Ins. Co. 111 Mass. 93 207
Tobin v. Gillespie, 152 Mass. 219 119
——— v. Larkin, 187 Mass. 279 247
Todd v. Keene, 167 Mass. 157 342
——— v. Tarbell, 187 Mass. 480 487
Tognazzi v. Milford & Uxbridge Street Railway, 201 Mass. 7 281
Tolhausen v. Davies, 57 L. J. Q. B. 392 452
——— v. ———, 58 L. J. Q. B. 99 452
Tompkins v. Hill, 145 Mass. 379 78
Toole v. Commonwealth, 11 Leigh, (Va.) 714 415
Towle v. Swasey, 106 Mass. 100 439
Towns v. Wentworth, 11 Moore P. C. 526 487
Townsend v. Little, 109 U. S. 504 363
——— v. Tyndale, 165 Mass. 293 250
Tracy v. Ginzberg, 189 Mass. 260 151
Train v. Marshall Paper Co. 180 Mass. 513 596
Trippe v. Huncheon, 82 Ind. 307 596
Trist v. Child, 21 Wall. 441 246
Tritt v. Crotzer, 13 Penn. St. 451 379
Trowbridge v. Spinning, 23 Wash. 48 288
Tucker v. Buffalo Cotton Mills, 76 S. C. 539 494
Turner v. Boston & Maine Railroad, 158 Mass. 261 493
——— v. Page, 186 Mass. 600 87
——— v. Robbins, 183 Mass. 207 304
Tutwiler Coal, Coke & Iron Co. v. Enslen, 129 Ala. 336 494

Ulman v. Ulman, 148 Mich. 353 289
Union Institution for Savings v. Phoenix Ins. Co. 196 Mass. 230 581
Union Pacific Railway v. McDonald, 152 U. S. 262 493
United States v. Banks, 17 Fed. Rep. 322 380
——— v. Hart, 4 Fed. Rep. 292 380
——— v. Insley, 130 U. S. 263 217

Valentine v. Farnsworth, 21 Pick. 176 12
Valpey v. Rea, 130 Mass. 384 394
Vanderbilt v. Eidman, 169 U. S. 480 378
Vattier v. Hinde, 7 Pet. 252 363
Vose v. Singer, 4 Allen, 226 144

Wadsworth v. Boston Elevated Railway, 182 Mass. 572 349
——— v. Williams, 100 Mass. 126 431
Waithman v. Elsee, 1 C. & K. 35 180
Wakely v. Hart, 6 Binn. 816 410
Walker v. Brown, 165 U. S. 654 246
——— v. Sherman, 11 Met. 170 568
Wall v. Provident Institution for Savings, 3 Allen, 96 78
Waltham Manuf. Co. v. New York & Texas Steamship Co. 204 Mass. 253 273
Walton v. Draper, 206 Mass. 20 486
Warren v. Boston & Maine Railroad, 168 Mass. 484 212
——— v. Fitchburg Railroad, 8 Allen, 227 445
Watertown Fire Ins. Co. v. Simmons, 131 Mass. 85 177
Watriss v. National Bank of Cambridge, 124 Mass. 571 311
Watts v. Stevenson, 165 Mass. 518 291
Weatherbee v. New York Life Ins. Co. 182 Mass. 342 207
Weaver v. Barden, 49 N. Y. 286 363
Webb v. Bailey, 41 W. Va. 463 363
Webb Granite & Construction Co. v. Boston & Maine Railroad, 206 Mass. 572 359
Webber Lumber Co. v. Shaw, 189 Mass. 366 418
Weeks v. Brooks, 205 Mass. 458 551
Weitzmann v. Barber Asphalt Co. 190 N. Y. 452 452
Welch v. Adams, 152 Mass. 74 458
——— v. Boston, 208 Mass. 326 96
——— v. Walsh, 177 Mass. 555 177
——— v. Wesson, 6 Gray, 505 169
Wells, In re estate of, 142 Iowa, 255 464
——— v. Morrow, 38 Ala. 125 363
Welsh v. Briggs, 204 Mass. 540 122
Weston v. City Council of Charlestown, 2 Pet. 449 110
——— v. Railroad Commissioners, 205 Mass. 94 317
Wheelock v. Wheelwright, 5 Mass. 104 276
White v. Foster, 102 Mass. 375 363
——— v. Lang, 128 Mass. 598 168
——— v. Weatherbee, 126 Mass. 450 247
Whiting & Sons v. Barton, 204 Mass. 169 337
Whitman v. Boston Elevated Railway, 181 Mass. 138 294
——— v. Oxford National Bank, 176 U. S. 559 597
Whitney v. Wellesley & Boston Street Railway, 197 Mass. 495 79
Whittaker v. Bent, 167 Mass. 588 154
Wiggin v. Dorr, 3 Sumner, 410 245
Wilcox v. Forbes, 173 Mass. 63 394
Willard v. Boston, 149 Mass. 176 304
——— v. Wood, 164 U. S. 502 250
Williams v. Boston, 208 Mass. 497 580
——— v. Bowers, 197 Mass. 565 94, 120
——— v. Commonwealth, 168 Mass. 364 311
——— v. Dedham, 207 Mass. 412 94
Williston Seminary v. County Commissioners, 147 Mass. 427 23
Willoughby v. Willoughby, 1 T. R. 763 363
Wilson v. Trenton, 27 Vroom, 469 119
Winchester v. Charter, 12 Allen, 606 428
Windmiller v. Northern Pacific Railway, 52 Wash. 613 606

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Winnisimmet Co. v. Wyman, 11 Allen, 432 4
Wood v. Boston Elevated Railway, 188 Mass. 161 80
——— v. Chapin, 13 N. Y. 509 379
Woodbury v. Beverly, 153 Mass. 245 190
Wormley v. Wormley, 8 Wheat. 421 363
Wright v. Blakeslee, 101 U. S. 174 191
——— v. State, 18 Ga. 383 144
Wylie v. Cotter, 170 Mass. 356 341
——— v. Marinofsky, 201 Mass. 583 506
Yarmouth v. France, 19 Q. B. D. 647 496
York v. Barstow, 175 Mass. 167 481
Zell's appeal, 111 Penn. St. 532 419
Zoebisch v. Tarbell, 10 Allen, 385 452

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

WINNISIMMET COMPANY *vs.* EDWARD L. GRUEBY & others.

Suffolk. March 8, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Eminent Domain. Winnisimmet Company.

While it is a general rule that, where an interest in land is taken by right of eminent domain for a purpose not inconsistent with a general right of property in the owner, the interest taken is not a fee but only an easement, nevertheless the question is always one of construction of the statute authorizing the taking, and it is not necessary that the power to take and hold the land in fee should be stated in any set terms, any language in the statute which makes that meaning clear being sufficient.

Under all the circumstances attending their enactment, chapters 188 and 345 of St. 1871, which authorized the Winnisimmet Company, a corporation organized under a special charter, St. 1833, c. 197, for the purposes of maintaining a ferry between Boston and Chelsea, to purchase or otherwise take for the purpose of widening its ferry slip certain property described accurately in the statute "with all the rights, privileges, appurtenances and easements to . . . said estate belonging," and provided that nothing therein contained should "give said ferry company any right to enter upon, or deal with anything less than the whole of the parcel of land" therein "described or intended," and also provided that the act should be void unless the land should be purchased and paid for, or otherwise taken and notice of such taking given in writing to the owner of the land or his representatives within six months from its passage, gave that corporation the right to take by eminent domain a fee in the whole land described with all its easements and appurtenances.

PETITION, filed in the Land Court on November 2, 1909, for the registration of the title to premises near the foot of Hanover Street in Boston, extending from above high water mark to be-

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low low water mark to the so called "Old Harbor Commissioners' line."

The petitioner's title was alleged to have been acquired by a taking by eminent domain under authority of St. 1871, cc. 188, 345. The respondents were the heirs at law of the owner of the premises at the time of the taking, and were then and at the time of the filing of the petition the owners of land adjoining the locus.

The case was heard in the Land Court by *Davis*, J. The facts are stated in the opinion. At the close of the evidence the respondents asked the trial judge to rule (1) that the petitioner acquired by virtue of its taking only an easement, and not an absolute fee simple; (2) that the petitioner could not maintain its petition; and (3) that, if the petitioner could register any title in this case, it should be only to such rights to use and occupy the premises for the purpose of widening its ferry slip as it acquired under St. 1871, cc. 188, 345, and that such title should be registered with full recognition of the rights of the respondents as owners of the fee.

The judge refused to make any of the rulings thus requested, and made a decree for the petitioner. The respondents alleged exceptions.

R. B. Stone, for the respondents.

J. R. Dunbar, (*A. P. Teele* with him,) for the petitioner.

HAMMOND, J. The only question is whether by the taking under St. 1871, c. 188, as amended by St. 1871, c. 345, the petitioner acquired a fee in the locus.

The right to take private property for a public use is founded upon and limited by public necessity. Where the necessity stops there stops the right to take, both as to amount of land and the nature of the interest therein. Accordingly the general rule is that where land is taken for a purpose not inconsistent with a general right of property in the owner the right taken is not a fee, but only an easement. *Harback* v. *Boston*, 10 Cush. 295. *Rockport* v. *Webster*, 174 Mass. 385. *Newton* v. *Newton*, 188 Mass. 226, and cases cited therein. In the first case above cited Shaw, C. J., said (p. 297): "When, therefore, the Legislature, being vested with the exercise of this high power, use language not precise and explicit, but open to construction, and if one

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construction would convey the power beyond the limit necessary to meet the public exigency, and another construction would limit it by the extent of such exigency, we think the latter ought to be adopted, as the one intended by the Legislature."

But sometimes a fee is taken. *Dingley* v. *Boston*, 100 Mass. 544. *Page* v. *O'Toole*, 144 Mass. 303. And in the former of these two cases Chapman, C. J., uses the following language: "Whether land be taken under the clause [in the State Constitution] authorizing the making of wholesome and reasonable laws, or by virtue of the clause authorizing the appropriation of private property to public uses, it must in either case be left to the Legislature to decide what quantity of estate ought to be taken in order to accomplish its purpose, and do the most complete justice to all parties. In the taking of other property no one would doubt that an absolute title might be acquired. . . . In taking land for highways, the Legislature has not deemed it necessary to take more than an easement; but the easement is usually perpetual. . . . The Constitution provides for the protection of all private property, and it provides that, when the public exigencies require that the property of any individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor. But it leaves the Legislature, without any restriction, express or implied, to decide in each case as it arises, what constitutes such exigency; and if land is to be taken, what estate in it shall pass." (p. 560.) The question is always one of the construction of the statute authorizing the taking (*Harback* v. *Boston*, *ubi supra*), and, as said by Holmes, J., in *Newton* v. *Perry*, 163 Mass. 319, 321, "there are no sacramental words which must be used in a statutory power to take and hold lands in order to give a right to take the lands in fee. Any language in the statute which makes its meaning clear is sufficient."

In the light of the circumstances existing at the time of the enactment of the statute in question what is its true interpretation? The petitioner was incorporated under a special act (St. 1833, c. 197), by which it was empowered "to purchase and hold any ferry or ferry rights, between Boston and Chelsea, and to construct and maintain wharves, landing places, and other works suitable and convenient for the steamboats and other vessels which may be used on any such ferry, and for the accommo-

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dation of foot passengers, horses, carriages and merchandise; provided, that nothing herein shall authorize said corporation to take private property for any of said purposes, otherwise than by legal authority from the owners thereof, nor to build any bridge or dam over the channel of any public navigable waters, or otherwise permanently to obstruct the same." It was further provided that said corporation might purchase and dispose of the whole or any part of the real estate held by certain trustees and described in a certain deed therein named, and "such other real estate at or near the landing places of any such ferry, not exceeding in value $75,000, as may be necessary or convenient for the purposes aforesaid, together with vessels and steam boats, and such other personal property, not exceeding in value $100,000, as may be necessary and convenient for the better management of any such ferry, and of the affairs of said corporation."

In October, 1833, the corporation purchased the ferry property and other real estate and took the title thereto in fee. The land and flats immediately adjoining the ferry property on the south including the locus were owned in 1837 by one Aspinwall. At that time the estates of the corporation and Aspinwall and of adjoining proprietors extended only to low water mark, but by St. 1837, c. 211 and c. 212, both the corporation and Aspinwall were granted rights to extend their respective wharves to the old commissioners' line. A controversy arose between Aspinwall's successors in title and the corporation claiming under these legislative grants as to the boundary line between these estates below low water mark. By a decision of this court rendered in 1865 (*Winnisimmet Co.* v. *Wyman*, 11 Allen, 432) the line was located further over upon the land of the corporation, thereby contracting its extent. In 1871 the corporation needing more land petitioned for authority to take some adjoining land for ferry purposes. The situation at that time is stated by the Land Court in the following language: "The Winnisimmet Company owned its adjoining ferry property in fee and was authorized by its charter to so hold it. It had trespassed on the land now in question by maintenance of piles for one wing of its ferry slip in such a manner as to interfere with the legitimate use of the whole of the present locus. After extended litigation it had been ejected therefrom. It had then failed to obtain any portion of the

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present property by agreement with the owner." It had no way of getting the property except by legislative grant, and this it did not have. It never had been authorized to take property by right of eminent domain, even although the use it desired to make of it was a public use. The land was substantially the northerly half of a long, narrow strip reaching from Commercial Street northerly to the commissioners' line, and was about three hundred and twenty feet long and about forty-eight feet wide at one end and sixty-six feet at the other, a part being above low water mark and a part below, with the rights and easements granted by St. 1837, c. 211. The ferry was upon one side of it and Constitution Wharf, in which the owner of this land is not shown to have had any interest, was upon the other. Such was the situation, and such were the circumstances leading to it, at the time of the passage of St. 1871, c. 188.

The statute was passed upon the petition of the corporation for authority "to take land adjoining its present ferry slip in the city of Boston for the purpose of widening said ferry slip." The first section authorizes the corporation "to widen their ferry slip . . . in the city of Boston." The second section provides that the corporation "may purchase, or otherwise take, for the purpose of such widening" the locus, accurately describing it, "with all the rights, privileges, appurtenances and easements to . . . said estate belonging." It further provides that if the corporation shall not be able to obtain such land by an agreement with the owner thereof "they shall pay therefor such damages as shall be" assessed in legal proceedings to be instituted for that purpose. Then follows the third section: "Nothing herein contained shall give said ferry company any right to enter upon, or deal with anything less than the whole of the parcel of land herein described or intended; and this act shall be void unless said land shall be purchased and paid for, or otherwise taken, and notice of such taking given in writing, to said Grueby or his representatives within six months from its passage."

It is to be noted that we are not dealing with a statute which is laying down the rules under which every ferry corporation shall take property at any time thereafter. The whole case is before the Legislature. The land to be taken is specifically described, and it is to be taken with all the rights, privileges, appurtenances

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and easements thereto belonging. And the corporation can take nothing less than the whole of the parcel of land. It must take the whole if anything, and it must purchase and pay for the land or take it within six months.

The conviction forced upon a person reading this statute in the light of the situation is that it is dealing with one special piece of property under peculiar circumstances; that the Legislature was of the opinion that the ferry should be widened as prayed for by the corporation; that to do complete justice to both parties all the land with its easements and appurtenances should pass from the owner to the corporation, and that if the corporation could not purchase the property, it might take it, and that whether the corporation took by purchase or by right of eminent domain was immaterial so far as respected the amount of the land, or the nature of the interest, taken. In either event it was to acquire under the peculiar circumstances the same estate, namely, a fee in the whole land with its easements and appurtenances. There seems to be no other reasonable construction of the statute. The amending statute being St. 1871, c. 345, has no bearing to the contrary.

Exceptions overruled.

JENNIE O. ALBEE *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 8, 9, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, In use of highway, Street railway. *Street Railway.*

In an action by a woman against a corporation operating a street railway, for personal injuries from being run into by a car of the defendant as the plaintiff was attempting to cross a public street at half past eight o'clock on an evening late in November when the rain was falling heavily and a very high wind was blowing, the plaintiff testified that she looked twice and saw the car, first when she stepped from the curbstone, which was about seventeen feet from the track, and afterwards when she was about half way between the curbstone and the track, that at this last time the car was about one hundred and twenty-five feet away and was approaching slowly, that she thought that she had time to get across and made the attempt. The evidence tended to show that she had got almost over the farther rail of the track when she was struck by the corner of the fender of the car. The plaintiff also testified that the street at the time of the

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accident was substantially deserted, there being in sight only the car which struck her and another car several hundred feet away, which was approaching from the opposite direction. *Held*, that the questions, whether the plaintiff looked as often as she ought to have looked and as late as she ought to have looked and whether she was justified in thinking that she had time to get across the track ahead of the car, as well as the questions, whether the accident was due to the failure of the motorman to diminish the speed of the car when approaching the plaintiff and whether he was negligent, were for the jury.

TORT for personal injuries from being knocked down by a car of the defendant on the evening of November 24, 1907, in Boston, when the plaintiff, having come from Marlborough Street, was crossing Boylston Street near Arlington Street, in order to take an inbound car on the opposite side of the street. Writ dated January 8, 1908.

In the Superior Court the case was tried before *Harris*, J. The evidence is described sufficiently in the opinion. At the close of the evidence, the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $2,500. The defendant alleged exceptions.

E. P. Saltonstall, (*C. W. Blood* with him,) for the defendant.

F. P. Garland, (*F. J. Daggett* with him,) for the plaintiff.

HAMMOND, J. While the plaintiff was crossing Boylston Street near Arlington Street in Boston at 8.30 o'clock P. M., in November, the rain falling heavily at the time and a very high wind blowing, she came into collision with the left hand corner of the fender of one of the defendant's cars while it was in motion, and was injured. She testified that she looked and saw the car twice; once when she stepped from the curbstone which was about seventeen feet from the track, and once when she was about half way between the curb and the track; that the last time she looked the car was about one hundred and twenty-five feet away and coming slowly; that she thought she had time to get across and made the attempt. The evidence tended to show that she had got almost over the farther rail of the track when she was hit. She testified farther that the street at that place was substantially deserted, there being only this car and another car several hundred feet away from her approaching from the opposite direction.

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Upon all the evidence we are of opinion that the questions, whether she looked as often as she ought to have looked and as late as she ought to have looked, and whether she was justified in thinking that she had time to get over the track ahead of the car, as well as the questions, whether the accident was due rather to the failure of the motorman to slow up when approaching the plaintiff than to any proper lack of judgment on her part, and whether the motorman was negligent, were for the jury. See *Hunt* v. *Old Colony Street Railway*, 206 Mass. 11; *Hennessey* v. *Taylor*, 189 Mass. 583; *McCrohan* v. *Davison*, 187 Mass. 466. The case is distinguishable from *Holian* v. *Boston Elevated Railway*, 194 Mass. 74, and other similar cases cited by the defendant.

Exceptions overruled.

JAMES LAVIN *vs.* LEANDER E. H. JONES & others.

Suffolk. March 9, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

If a person, who has the general control of a house in process of construction, hires a laborer to work in and about the house where it is necessary for him to pass into and from the house over a plank, and the employer takes no pains to see whether the plank is suitable for the purpose, and, if the plank is rotten on its under side and breaks while the laborer in the course of his employment is crossing it with a barrel of refuse, the employer is liable to the laborer for his injuries thus caused, if he was in the exercise of due care.

TORT against four defendants as copartners, who were engaged in a building and real estate business and employed the plaintiff as a laborer, for personal injuries sustained by the plaintiff from the breaking of a plank, alleged to have been rotten on its under side, when the plaintiff in the course of his employment was carrying a barrel of refuse over the plank, which served as the exit from one of a row of houses then in process of construction under the general direction of the defendants, although they employed independent contractors for doing the carpenter's work and the painting. Writ dated July 15, 1907.

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In the Superior Court the case was tried before *Sherman*, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of all the evidence, the defendants asked the judge to rule that the plaintiff was not entitled to recover. The judge refused to make this ruling and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $500. The defendants alleged exceptions.

J. J. Mansfield, (*J. J. Gearin* with him,) for the defendants.

J. P. Magenis, (*J. Wentworth* with him,) for the plaintiff.

HAMMOND, J. This case is close; but on the evidence we think the jury might legally find that the defendants hired the plaintiff to work in or about the house; that in the course of his employment he would be called upon to use the plank in question as a way of entrance into and exit from the house and that the defendants had impliedly adopted the plank as fit for that purpose and expected and intended that the plaintiff should so use it. They might further find that the defendants, so expecting and intending, took no pains whatever to see whether the plank was suitable for that purpose; that the plank was not suitable, and that, in failing to take proper care in this respect, the defendants were negligent in the performance of a duty they owed to the plaintiff; that the plaintiff was in the exercise of due care; and that the accident was attributable solely to this negligence of the defendants.

Upon such findings there was a case for the plaintiff.

Exceptions overruled.

ETHEL C. WELD *vs.* NATHAN D. A. CLARKE.

Middlesex. March 9, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Res Judicata. Judgment. Parties and Privies. Proceedings to compel Action to try Adverse Claim to Land.

A person, who was not a party to a suit in equity, can be found to have been a privy, so as to be bound by the decree, if he was beneficially interested in the subject matter of the suit and caused it to be brought in part for his benefit, directing and controlling its prosecution and bearing the expense.

At the trial of a writ of entry to recover the possession of certain land, it appeared

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that the title of the demandant's grantor, which depended upon the validity of a tax deed, had been established by a decree in a suit in equity brought against such grantor by the holder of a mortgage on the land. The tenant contended that he was not bound by the decree because he was not a party to the suit in equity. It appeared that when the suit in equity was brought the tenant had a beneficial interest in the equity of redemption of the land and caused that suit to be instituted in the name of the holder of the mortgage for the joint benefit of such holder and himself, that he acted as counsel for the plaintiff, paid the costs and gave his professional services, retaining his beneficial interest in the equity of redemption although not a party to the suit. *Held*, that the tenant was bound by the decree and was precluded from contesting the validity of the tax deed, so that the demandant was entitled to judgment.

Upon a petition under R. L. c. 182, §§ 1–5, by a person in possession of land claiming an estate of freehold therein, to compel actual or possible adverse claimants to bring actions to try their claims, the question of the title to the land cannot be adjudicated, and a disclaimer by a respondent under § 3 does not operate to convey any new title to the petitioner, or to preclude one holding under a deed from the disclaiming respondent, which was unrecorded at the time of the disclaimer, from afterwards asserting his title.

WRIT OF ENTRY to recover possession of a certain parcel of land in Medford, which was the subject of the two suits in equity, decisions in which are reported in *Roberts* v. *Welsh*, 192 Mass. 278. Writ in the Land Court dated January 8, 1909.

In the Land Court the case was tried before *Clark*, J. The judge filed a memorandum of decision in which he found the facts which are stated in substance in the opinion. It was agreed by the parties that the findings of the judge were warranted by the evidence. The judgment in the proceeding of Holt *v.* Welsh, referred to in the decision of the judge and in the opinion of this court, was "Judgment for respondent with costs on his disclaimer." The judge ruled that the demandant in the present action was not bound by the disclaimer of Welsh. To this ruling the tenant excepted.

At the close of the evidence the tenant asked the judge to make the following rulings:

"1. There is no evidence in this case sufficient to warrant the court in finding that the tenant was either a party or privy to the cases of *Roberts* v. *Welsh*, 192 Mass. 278, or to the judgments or decrees therein rendered.

"2. There is no evidence in this case sufficient to warrant the court in finding that the tenant at any time had any right, title or interest in the mortgage held by the plaintiff in said cases of *Roberts* v. *Welsh*. [This ruling was made by the judge.]

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"8. The demandant is bound by the disclaimer filed in the case of Holt *v.* Welsh, being No. 233 on the docket of the Land Court, and said disclaimer defeats the demandant's title.

"4. The demandant is bound by the judgment rendered in said case of Holt *v.* Welsh, and said judgment defeats the demandant's title.

"5. There is no sufficient evidence in this case to warrant the court in finding for the demandant.

"6. Upon all the evidence in this case the court should find for the tenant.

"7. The tenant is not bound by the judgments or decrees rendered in said cases of *Roberts* v. *Welsh*."

The judge made the second ruling requested and refused to make any of the others. He ruled that the decision in the two cases of *Roberts* v. *Welsh*, which determined that the two tax deeds there in question were valid, was conclusive upon the tenant and that he could not now set up any title as against those claiming under Welsh. The judge found for the demandant; and the tenant alleged exceptions.

The case was submitted on briefs.

J. C. Batchelder, for the tenant.

J. Bennett, for the demandant.

BRALEY, J. The tenant, when the owner, conveyed the demanded premises in fee for the purpose of having the grantee mortgage the land, and, after this had been effected, received back a conveyance of the equity of redemption. The taxes having fallen into arrears for two consecutive years, the collector made separate sales of the estate, which was purchased by one Welsh, who received and recorded the deeds. The mortgage having been assigned to one Roberts, he brought bills in equity to have the sales declared invalid for errors and informalities in the assessments and the collector's deeds. But, the sales being held valid, the bills were dismissed, and Welsh then deeded the land to the demandant, whose title, having been put in issue by the tenant's plea, depended upon the validity of the tax deeds. *Roberts* v. *Welsh*, 192 Mass. 278. *Green* v. *Kemp*, 13 Mass. 515.

It early was decided, that a tax deed with its recitals of itself affords no presumption of regularity, and the burden rested on

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the demandant to show affirmatively by extrinsic evidence that the requirements of the statute had been followed. *Alvord* v. *Collin*, 20 Pick. 418, 421. *Harrington* v. *Worcester*, 6 Allen, 576. *Burke* v. *Burke*, 170 Mass. 499. See St. 1911, c. 370. But no proof was offered, as the judge ruled that the tenant was estopped by the decrees. It is insufficient to create an estoppel, that, if the plaintiff obtained relief, it must have enured to the tenant's benefit, or that in the present action the parties are interested in proving or disproving the same facts as were there involved. *Sturbridge* v. *Franklin*, 160 Mass. 149, 151. If the tenant, however, to establish or protect his own title, caused the suits in equity to be instituted in the name of Roberts, for their joint benefit, and directed and controlled the prosecution, he was the real party in interest, even if a stranger to the litigation upon the face of the record. *Valentine* v. *Farnsworth*, 21 Pick. 176. *Elliott* v. *Hayden*, 104 Mass. 180, 182. *Brigham* v. *Fayerweather*, 140 Mass. 411, 416. The judge found, that the tenant acted as counsel for the plaintiff, paid the costs, and gave his professional services, while retaining his beneficial interest in the equity of redemption, even if the legal title was in numerous persons to whom at various times he caused it to be conveyed. The judge also was satisfied, that the tenant's title would be affected by the result. It is certain that, if the tax titles were set aside, although the mortgage still would be an outstanding incumbrance, the equity of redemption also would be preserved. The tenant under these findings is shown to have been substantially interested in the subject matter of these suits, with full opportunity to control the proceedings, to examine witnesses, and to take and prosecute an appeal from the decrees of the trial court to this court. While not having been joined as a party to the proceedings, yet he acted in conjunction with Roberts or as the real party in interest and as manager of the suits. The tenant therefore, having been bound by the decrees, is estopped from contesting the validity of the tax deeds. *Elliott* v. *Hayden*, 104 Mass. 180. *Nash* v. *D'Arcy*, 183 Mass. 30. *Cecil* v. *Cecil*, 19 Md. 72. *Peterson* v. *Lothrop*, 84 Penn. St. 223. *American Bell Telephone Co.* v. *National Improved Telephone Co.* 27 Fed. Rep. 663.

It appeared in the itinerary of the equity of redemption, that

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one Holt while the owner brought a petition under R. L. c. 182, §§ 1–5, against Welsh to require him to try his title, and caused notice of the pendency of the petition to be entered in the registry of deeds. But Welsh, having previously conveyed to the demandant, who did not record the deed until after the notice had been filed, appeared and disclaimed the alleged ownership. It is contended by the tenant, that the judgment on the disclaimer in favor of Holt vested the absolute title to the land in him, or in other words, that Holt by the disclaimer became an innocent purchaser for value without notice of the prior conveyance. The tenant misconceives the purpose of the statute. It was not intended as a substitute for the remedies which may be used for the recovery of land. In *Orthodox Congregational Society* v. *Greenwich*, 145 Mass. 112, 113, it was said by Chief Justice Morton of the Pub. Sts. c. 176, where a similar provision is found, "The object of the proceedings is not to try the title to the real property; the court cannot make any decree, unless the respondent makes default, which will operate as a conclusive adjudication of the title of either party." The disclaimer is to be treated as a pleading which did not operate to convey any new source of title to the petitioner, or estop the demandant from claiming that the tax title was paramount to the tenant's estate.

The third and fourth requests were properly refused, and the first, fifth, sixth and seventh were rendered inapplicable by the findings of the judge.

Exceptions overruled.

MICHAEL J. MONAHAN *vs.* WILLIAM W. BABCOCK COMPANY.

Suffolk. March 10, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Contract, Construction. *Words*, "All windows in."

Where, in a construction mortgage agreement relating to the erection of a dwelling house, it is stipulated that a certain payment for plastering shall be due "when said building shall be plastered and skimmed and all windows in and blinds hung," this can be found to mean that the payment shall not be due until the windows are finished with sashes and glass ready for use as completed

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windows, and that the windows are not "in" within the meaning of the condition when the holes for them have been made and the general frames have been inserted, with nothing further done.

CONTRACT for $496 and interest alleged to be due and payable to the plaintiff on an order drawn by one McKenney and one Foss on the defendant, a corporation engaged in lending money on construction mortgages. Writ in the Municipal Court of the City of Boston dated April 14, 1909.

The order was as follows:

"July 12, 1907. William W. Babcock Company: Please pay to M. J. Monahan Four Hundred ninety-six Dollars ($496) for plastering and skimming house on lot A Middlesex Road, Brookline, out of the plaster payment on your mortgage loan on lot A Middlesex Road when the same shall become due.

"Lewis T. McKenney,
Walter F. Foss,
"Trustees under a Declaration of Trust known as the Middlesex Circle Apartment Trust."

This order was accepted in writing by the defendant as follows:

"Boston, August 20, 1907. We accept the above order and agree to pay the same on the following conditions only: — When the plaster payment shall become due on lot 'A' Middlesex Road, Brookline, as per construction mortgage agreement between William W. Babcock Company and Charles W. Marshall, we will pay M. J. Monahan the sum of $496.00.

"William W. Babcock Company,
Cora M. Jeffrey."

On appeal to the Superior Court the case was heard by *Morton*, J., without a jury.

The defendant admitted that this order was drawn against it and that it was accepted in the form above stated; that Miss Jeffrey, the secretary of the company, was authorized to accept it; and that the plaintiff went ahead and did the work; but the defendant denied that the builder ever got the work along to the stage where the plaster payment, so called, was due from the mortgagee.

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The defendant contended that the acceptance was a conditional one, and that the only question was whether the conditions of the acceptance had been complied with. Upon this point there was evidence which is referred to briefly in the opinion.

No copy of the construction mortgage agreement, referred to in the defendant's acceptance of the order, was included in the bill of exceptions. The following testimony in regard to its material provision occurred in the cross-examination of the defendant's president. He testified that the defendant did a large business in lending money on construction loans; that the written agreement as to the loan for the building to be put on lot A provided how the payments should be made; that the first and second payments were reached and paid, that the third payment of $1,500 was to be made according to the written agreement "When said building shall be plastered and skimmed and all windows in and blinds hung"; that this was the plaster payment, so called; that the building did not reach the stage where the plaster payment, so called, could be required; and that the builders failed to earn the plaster payment by not putting in the windows. He further testified that he should have waived the objection that no blinds had been put on if it had been called to his attention that awnings were to be used.

At the conclusion of the testimony, the judge stated that it appeared to be clear that there were holes in the wall with the wood work or frames around them, but that none of the cross bars, nor glass, none of the movable portion of the windows, had been put in, and that, this being so, he would find as a fact that the specified contract was not complied with, and that the plaintiff was not entitled to recover.

The judge found for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

J. F. O'Connell, J. E. O'Connell & D. T. O'Connell, for the plaintiff.

J. L. Bates, F. N. Nay & L. M. Abbott, for the defendant.

HAMMOND, J. The acceptance of the draft was conditional and the condition was that the plaster payment should be due. Did that payment ever become due? By the contract between

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the builder and the defendant it was to be due "when said building shall be plastered and skimmed and all windows in and blinds hung."

All that the builder ever did as to the windows was to make the openings and put in the general frames without the sashes or glass. The plaintiff contended and introduced evidence in support of the contention that windows were "in" when the holes were made and the general frames were inserted. But there was some conflict in the evidence. The defendant did not seem to rely upon the fact that the blinds were not hung, because awnings were to be used and blinds in such case would not be needed, but insisted that the part of the contract which related to the windows had not been performed.

The judge before whom the case was tried without a jury found as a fact that the specified contract had not been complied with, and found generally for the defendant; and the case is before us upon the plaintiff's exceptions to those findings.

The house to be constructed was situated in Brookline, and, we understand, was to be a dwelling house. It is unnecessary to recite the evidence in detail. It is sufficient to say that, whatever may be the meaning of the word "window" in certain connections, the evidence warranted a finding that the phrase "all windows in," when taken in connection with the phrase "blinds hung," and all being a part of a clause in the contract for the erection and completion of a dwelling house, meant windows fitted with sashes and glass ready for use as completed windows.

Exceptions overruled.

NICHOLAS A. LYNCH *vs.* FISK RUBBER COMPANY.

Suffolk. March 10, 1911. — May 18, 1911.

Present: KNOWLTON, C.J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, In use of highway, In driving automobile.

If a man, who is employed by marketmen in a city to deliver goods to their customers, which he carries either in bundles or on his shoulders, when returning to his place of employment after making such a delivery, has occasion to pass

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over a crosswalk of a public street, and before starting on the crosswalk looks in each direction and sees that everything "looks clear," and if when he is on the crosswalk he is run into and injured by a motor car, whose driver has been engaged in conversation with an occupant of the car, toward whom he has turned his head, and is giving little if any attention to travellers in front of him, the person thus injured, in an action brought by him against the owner of the car, has a right to go to the jury, who are to say whether the plaintiff was in the exercise of due care and whether under the circumstances the inattention of the driver was sufficient proof of his negligence.

BRALEY, J. This is an action to recover for personal injuries suffered by the plaintiff from being run over by an automobile, owned and operated by the defendant, while they were concurrently using a public way.* In the Superior Court at the close of the plaintiff's evidence, a verdict was ordered † for the defendant, and the case is here on exceptions.

It is the defendant's contention, that there was no evidence of the plaintiff's due care or of the defendant's negligence. The plaintiff was employed by marketmen to deliver goods to their customers, which he carried in bundles either on his shoulders or in his arms. After making a delivery on the day of the accident he was returning to his place of employment when it became necessary to pass over the street where he was struck, while on the crosswalk, by the automobile, and the jury could find that before starting he looked in each direction and saw that "everything looked clear." But, even if he had not taken this precaution, his conduct under the circumstances would not, as matter of law, have prevented his recovery if he had been injured by a passing team. *Murphy* v. *Armstrong Transfer Co.* 167 Mass. 199. And the fact that the defendant's conveyance was an automobile instead of a horse drawn vehicle is immaterial. *Hennessey* v. *Taylor*, 189 Mass. 583. The jury further could have found that when the collision occurred the defendant's driver, having been engaged in conversation with an occupant of the car, with his head turned toward his companion, was giving little, if any, attention to travellers in front of him. It was for them to say, whether this inattention under the circumstances was sufficient proof of his negligence. The case cannot

* Summer Street in Boston.

† By *Brown*, J.

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be distinguished in principle from *Donovan* v. *Bernhard*, 208 Mass. 181, and should have been submitted to the jury.

Exceptions sustained.

D. W. Corcoran, for the plaintiff.

W. H. Hitchcock, for the defendant.

PAUL B. WATSON & others, trustees, *vs.* CITY OF BOSTON.

Suffolk. March 10, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Tax, Upon personal property held in trust for literary, benevolent, charitable and scientific institutions. *Trust. Words*, "Property."

Review by HAMMOND, J., of legislation of Colony, Province and Commonwealth with regard to whether a tax upon property held in trust should be assessed to the trustee or to the beneficiary.

Under R. L. c. 12, § 5, cl. 3, now St. 1909, c. 490, Part I. § 5, cl. 3, exempting from taxation "the personal property of literary, benevolent, charitable and scientific institutions," the word "property" includes the equitable interest of a corporation, organized "for the purpose of furnishing education in the mechanical arts," in a trust fund created by a will, the entire income of which is paid to the corporation quarterly by the trustees under the will, and such fund therefore is exempt from taxation, it being immaterial that, if the fund were taxable, the tax, under § 23 of the same statutes, would be assessed to the trustees and not to the corporation.

PETITION, filed in the Superior Court on July 5, 1910, under St. 1909, c. 490, Part I. § 77, on appeal from a decision of the board of assessors of Boston refusing to abate a tax upon certain personal property held by the plaintiffs in trust for the Wentworth Institute, a corporation organized under directions contained in the will of Arioch Wentworth, late of Swampscott, "for the purpose of furnishing education in the mechanical arts."

In the Superior Court the case was heard by *Fessenden*, J., upon an agreed statement of facts.

The material provisions of the will of Arioch Wentworth were as follows:

The trustees were directed "To hold [a certain fund] . . . as trustees and to pay the net income therefrom quarterly on the

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first days of January, April, July and October of each year as follows: Seven hundred and fifty dollars ($750) each quarter to my daughter Susan M. Stuart; five hundred dollars ($500) each quarter to my grandson Arioch Wentworth Erickson; five hundred dollars ($500) each quarter to my grandson Willoughby Herbert Stuart, Jr.; and two hundred and fifty dollars ($250) each quarter to Cecile, wife of said Arioch Wentworth Erickson, during their respective lives, and the remainder of said net income each quarter to the Wentworth Institute hereinafter provided for. Said income shall not, before the payment thereof, to said beneficiaries, be assignable or attachable or trusteeable, or in any way or manner be liable for or liable to be taken for any debt, liability or contract of said beneficiaries or any of them, or be applied in any way or manner to the payment thereof. On the death of the last survivor of my said daughter, grandsons and grandson's wife, the trustees shall pay over to the said Wentworth Institute the whole of said trust fund. . . .

"The trustees, Watson, Wentworth and Atherton, above-named, shall forthwith qualify as such and organize a corporation to be known as the Wentworth Institute, for the purpose of furnishing education in the mechanical arts, the original incorporators to be nominated by the said trustees, Watson, Wentworth and Atherton with the approval of the attorney general of the Commonwealth."

The corporation has its offices and its only place of business in Boston. As soon as practicable after its incorporation the corporation acquired land on Huntington Avenue, Boston, and has been and now is erecting buildings thereon to be used exclusively for the purposes of the corporation from the funds provided by the will, and the entire net income is paid over to the corporation quarterly by the trustees.

Other facts are stated in the opinion.

The trial judge dismissed the complaint and reported the case for determination by this court.

C. F. Choate, Jr., for the plaintiffs.

J. D. McLaughlin, for the defendant.

HAMMOND, J. The petitioners do not contest their liability to be taxed for that part of the trust fund whose income is payable

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to certain persons, but they contend that the part whose income is payable to the Wentworth Institute is exempt from taxation. Inasmuch as this case concerns only this latter part, for the sake of brevity this part will be hereinafter designated as the trust fund.

R. L. c. 12, § 5, cl. 3,* so far as material to the question before us, provides that "the personal property of literary, benevolent, charitable and scientific institutions" shall be exempt from taxation. And the question is whether personal property held in trust to pay over the income to such an institution is within the statute.

R. L. c. 12, § 23, cl, 5,* provides that with certain exceptions personal property held by a trustee the income of which is payable to another person shall be assessed to the trustee. In any event therefore this fund cannot be assessed to the *cestui que trust* the Wentworth Institute. The contention of the respondent that the fund is not exempt is based largely upon this provision. It is stated in its brief as follows: "The statute exempting from taxation the personal property of certain institutions should be construed as exempting it only so far as such property would be otherwise taxable to such institutions. If, under the statutes declaring to whom property shall be assessed, the institution could not legally be assessed for its equitable interest in personal property, then the statute of exemptions cannot be invoked, because the object of this statute is merely to forbid an assessment where one could otherwise be legally made." And in support of this position it argues that the section exempting the property of the institutions named "does not operate on the property itself, but, read in connection with those sections of the same chapter which provide where and to whom property shall be assessed . . . [it] in effect declares that such institutions shall not be assessed for such property"; and further that under our scheme of taxation an assessment, so far, at least, as respects personal estate, is not a proceeding *in rem* but "purely one *in personam*" and "liability to pay . . . [taxes upon personal estate] attaches to the person and not to the property on account of which the tax is assessed."

* R. L. c. 12, §§ 5, 23, are now St. 1909, c. 490, Part I. §§ 5, 23.

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In considering the question it is well to look into the history of the legislation respecting taxation.

Under the Colonial statutes 1651–57 (Anc. Chart. 69), personal property held in trust appears to have been taxed to the trustee and not to those beneficially interested in the trust. It was described in these statutes as being "under their [the] custody or managing" of the person assessed. And the same provision is contained in the Provincial statutes. See Prov. Sts. 1692–93, c. 4, § 1; 1694–95, c. 2, § 4; 1 Prov. Laws, 29, 167, *et passim.* Early in the tax acts there was a provision that the assessors should make a fair list of the assessment, "setting forth in distinct columns, against each particular person's name, how much he or she is assessed at for polls, and how much for houses and lands, and how much for personal estate and income by trade or faculty." (This last phrase did not mean income from property, but from employment.) Prov. Sts. 1715–16, c. 11, § 2; 1740–41, c. 8, § 2; 2 Prov. Laws, 21, 1033, *et passim;* 1742–43, c. 31, § 2; 1745–46, c. 1, § 2; 3 Prov. Laws, 61, 233, *et passim.* And as early as 1747 this provision was amended by adding thereto the following: "and if as guardian, or for any estate in his or her improvement, in trust, to be distinctly expressed." Prov. Sts. 1746–47, c. 1, § 3; 1747–48, c. 1, § 3; 3 Prov. Laws, 288, 354. This provision is continued through the succeeding provincial statutes (Prov. Sts. 1757–58, c. 2, § 3; 1759–60, c. 2, § 3; 1767–68, c. 8, § 3; 4 Prov. Laws, 15, 261, 971, *et passim;* 1769–70, c. 1, § 3; 1773–74, c. 14, § 3; 1780, c. 16, § 3; 5 Prov. Laws, 19, 319, 1430, *et passim*) and the earlier State statutes (Sts. 1780, c. 43; 1781, cc. 16, 28; 1782, c. 65; 1784, c. 25; 1785, c. 74), up to St. 1795, c. 11, where the phrase "in his or her improvement" was changed to "in his or her possession"; and as thus verbally changed this part of the provision continued until St. 1804, c. 144, when it was changed so as to read "distinguishing any sum assessed on such person as guardian, or for any estate in his or her possession in trust," and so continued (see among others the tax acts of 1810, 1820) until the statute passed March 4, 1829, commonly cited as St. 1828, c. 143.

This statute made a change as to the assessment of trust property. It provided that "persons entitled to the income of any

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personal property held by others in trust for them, shall be liable to be taxed for the capital or principal sum in the town where such persons reside." And, with a modification as to married women not here material, such continued to be the law until changed in 1860 by the General Statutes. Rev. Sts. c. 7, § 10, cl. 5, and Report of the Commissioners on this clause.

The commissioners on the General Statutes recommended a change which in substance was adopted and became Gen. Sts. c. 11, § 12, cl. 5, which reads as follows: "Personal property held in trust by an executor, administrator, or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator, or trustee, in the place where such other person resides, if within the State, and if he resides out of the State it shall be assessed in the place where the executor, administrator, or trustee, resides, and if there are two or more executors, administrators, or trustees, residing in different places, the property shall be assessed to them in equal portions in such places, and the tax thereon shall be paid out of said income. If the executor, administrator, or trustee, is not an inhabitant of this State, it shall be assessed to the person to whom the income is payable, in the place where he resides." And such has been the law up to the present time. Pub. Sts. c. 11, § 20, cl. 5. R. L. c. 12, § 23, cl. 5. St. 1909, c. 490, Part I. § 23, cl. 5.

From this review of the tax legislation it appears that from 1651 to 1828 property held in trust was assessed to the trustee; from 1828 to 1860 to the *cestuis que trust;* and from 1860 to the present time, in certain cases to the trustee and in certain other cases to the *cestuis que trust.*

From an early period in our history there have been exemptions from general taxation. There are at least two classes, the first based upon the use to which the property is appropriated, as for instance the personal property of educational institutions, household furniture and workmen's tools; the second based upon the inability of the owner to pay a tax, as for example the estates of infirm and poor people. The property is exempt in the first class irrespective of the question whether the owner is able to pay a tax, and in the second irrespective of the nature of the use. The present general provision as to the exemption of the personal property of institutions like the Wentworth Institute

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was inserted in the Revised Statutes, and, with some modifications not material to the question before us, has continued to the present time. Rev. Sts. c. 7, § 5, cl. 2. Gen. Sts. c. 11, § 5, cl. 3. Sts. 1874, c. 375, § 8; 1878, c. 214. Pub. Sts. c. 11, § 5, cl. 3. Sts. 1882, c. 217, § 2; 1886, c. 231; 1888, c. 158; 1889, c. 465. R. L. c. 12, § 5, cl. 3. St. 1909, c. 490, Part I. § 5, cl. 3.

The legal title to this trust fund, it is true, is in the trustees, but the whole beneficial interest is in the institution. The term "property" in its ordinary legal signification "is *nomen generalissimum*, and extends to every species of valuable right and interest." *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1, 35. See also *Williston Seminary* v. *County Commissioners*, 147 Mass. 427. It certainly is broad enough to cover an equitable interest like that possessed by the Wentworth Institute in this trust fund.

Nor can it be material that the property is by law assessable to the trustee and not to the person entitled to the beneficial interest. The exemption is based upon the use which is presumed to be made of the fund, namely, for an educational purpose, and not upon the persons in whom stands the legal title. The law as to the assessment of personal property held in trust whose income is payable to another has been changed from time to time. As already stated, from 1828 to 1860 the fund was assessed to the *cestui que trust*, if living in the State, otherwise to the trustee in the town where he resided. R. L. c. 12, § 23, cl. 5, makes various provisions about the assessment of property held in trust, depending upon the respective residences of the trustee and beneficiaries. It is assessed to the trustee if residing in this Commonwealth, otherwise to the beneficial owner residing in this Commonwealth. And there are various provisions as to the particular town in which it shall be assessed. In this very case, if the trustees should remove from the Commonwealth the fund would be taxable to the Wentworth Institute; and hence, even upon the reasoning of the respondent, would be exempt. And if one of the trustees should afterwards become a resident of this Commonwealth, then it would be taxable to him and upon the same reasoning would not be exempt. And so, if the respondent's position is correct, property whose exemption is based upon the use to which it is appropriated would be exempt or not

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exempt according as the trustee lived without or within the Commonwealth.

This interpretation loses sight of the ground of the exemption and makes the exemption hinge upon a merely accidental circumstance not pertaining to the ground upon which it is based. It must be held to be unreasonable.

For the reasons above stated we are of opinion that the equitable interest of the Wentworth Institute in the trust fund is "property" within the meaning of the exempting clause of the statute, and that the section prescribing the manner of assessing trust funds in no way affects the right of exemption under that clause. Under this interpretation the question of exemption is made to depend not upon the irrelevant fact of the residence of the trustee within or without the Commonwealth as the case may be, but upon the true test, namely, the use to which the property is to be appropriated.

In accordance with the terms of the report the order is

Judgment for the petitioners.

COMMONWEALTH *vs.* DANIEL CASSIDY.

Suffolk. March 13, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Automobile. Evidence, Presumptions and burden of proof. *Words,* "Intersecting way."

St. 1909, c. 534, § 16, provides that every person operating a motor vehicle shall run it at a rate of speed no greater than is reasonable and proper, and that "it shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper" if such a vehicle is operated in excess of certain rates of speed in certain designated districts. At the trial of a complaint charging a violation of that statute, it was *held*, that the burden of showing that the defendant was operating a motor vehicle at a speed greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public, was upon the Commonwealth; and that, even if the speed at which the defendant was operating was such as to make out a *prima facie* case for the Commonwealth under the provisions of the statute, still the burden of proof did not change, and hence in some cases a defendant may be convicted even if he has not exceeded the rate named in the clauses of the statute referred to, and in some cases he may be acquitted even though he may have exceeded it.

At the trial of a complaint charging a violation of St. 1909, c. 534, § 16, which provides that every person operating a motor vehicle shall run it at a rate of speed

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no greater than is reasonable and proper, and that "it shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper" if such a vehicle is operated in excess of certain rates of speed in certain designated districts, it is erroneous for the presiding judge to refuse to give the following ruling: "There is no absolute or fixed speed limit at which automobiles may be operated in this Commonwealth; and if the jury find that the rate of speed was reasonable and proper, having regard to the traffic, use of the way and safety of the public, they should find for the defendant, no matter at what particular rate of speed they find he operated."

At the trial of a complaint charging a violation, by one operating an automobile in a city, of St. 1909, c. 534, § 16, which provides that every person operating a motor vehicle shall run it at a rate of speed no greater than is reasonable and proper, and that "it shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper" if such a vehicle is operated on any way inside the thickly settled part of a city at a rate of speed exceeding fifteen miles an hour for a distance of one-eighth of a mile, it is erroneous for the presiding judge to refuse to give the following ruling: "If the jury find that the defendant operated an automobile at a rate of speed in excess of fifteen miles an hour for one-eighth mile within the thickly settled part of the city, the jury should find for the defendant if they find that the rate of speed was not greater than was reasonable and proper having regard to the traffic, the use of the way and the safety of the public."

At the trial of a complaint charging a violation of St. 1909, c. 534, § 16, which provides that every person operating a motor vehicle shall run it at a rate of speed no greater than is reasonable and proper, and that "it shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper" if such a vehicle is operated in excess of certain rates of speed in certain designated districts, it is erroneous for the presiding judge to charge the jury in substance that, if they find that the defendant was operating a motor vehicle in a district and at a rate of speed designated in the statute as making out a *prima facie* case for the Commonwealth, and "there were no circumstances for the safety of the public or traffic in the road, or special conditions requiring a greater rate of speed," they "should return a verdict of guilty."

St. 1909, c. 534, § 16, which section went into effect on July 1, 1909, provides that every person operating a motor vehicle shall run it at a rate of speed no greater than is reasonable and proper, and, among other provisions, that it shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper if a motor vehicle is operated "on any way upon approaching an intersecting way, or in traversing a crossing or intersection of crossings" at a rate exceeding eight miles an hour. Section 1 of the statute defines "intersecting way" to mean "any way which joins another at an angle, whether or not it crosses the other." By § 33, all of the statute excepting certain designated sections, among which § 1 was not, and § 16 was, included, went into effect on December 31, 1909. Section 16 went into effect on July 1, 1909. At the trial of a complaint alleging a violation on December 2, 1909, of § 16, it appeared that the defendant was operating an automobile in excess of eight miles an hour at a point where two streets joined at an angle the street upon which he was, and one only of the two continued across that street, doing so under another name. The defendant asked for a ruling that there was no evidence "of more than one intersecting way or intersection of ways at the time the alleged offense was committed." The ruling was refused. *Held*, that the ruling was refused rightly, because, in spite of § 33, the definition of "intersecting way" in § 1 must be held to be applicable to that term as used in § 16.

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COMPLAINT, received and sworn to in the Municipal Court of the Roxbury District of the City of Boston on December 6, 1909, charging that the defendant on December 2, 1909, did "operate a certain automobile at a rate of speed that was greater than was reasonable and proper, having regard to traffic, the use of the way and the safety of the public," on Beacon Street in Boston.

Material portions of St. 1909, c. 534, § 1, are as follows: "Terms used in this chapter shall be construed as follows, unless a different meaning is clearly apparent from the language or context, or unless such construction is inconsistent with the manifest intention of the Legislature: . . .

"'Intersecting way,' shall mean any way which joins another at an angle, whether or not it crosses the other. . . ."

On appeal to the Superior Court, the case was tried before *Wait*, J.

The evidence of the Commonwealth tended to show that on the day in question the defendant operated an automobile, capable of holding seven passengers, at a rate between twenty-three and twenty-five miles an hour on the easterly side of Beacon Street, over a measured course for the distance of one eighth of a mile or more, within which course and on which easterly side two streets, Miner and Aberdeen Streets, entered and joined Beacon Street at an angle, and Arundel Street entered and joined Beacon Street at an angle at a point opposite Miner Street, so that Miner and Arundel Streets formed a continuation of each other; that Beacon Street on both sides of the course for a distance of over one quarter of a mile in each direction was entirely built up and occupied by brick houses, presenting a solid front, with the exception of two small separated vacant lots of about fifty feet front each; that at the time the defendant's automobile entered the measured course there were within the course two teams, two electric cars, one automobile and one woman crossing the street, all of which were passed by the defendant's automobile.

At the close of all the evidence the defendant asked for the following rulings:

"1. There is no absolute or fixed speed limit at which automobiles may be operated in this Commonwealth; and if the jury

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find that the rate of speed was reasonable and proper, having regard to the traffic, use of the way and safety of the public, they should find for the defendant, no matter at what particular rate of speed they find he operated.

"2. There is no evidence in this case of more than one intersecting way or intersection of ways at the time the alleged offense was committed.

"3. If the jury find that the defendant operated an automobile at a rate of speed in excess of fifteen miles an hour for one eighth mile within the thickly settled part of the city, the jury should find for the defendant if they find that the rate of speed was not greater than was reasonable and proper having regard to the traffic, the use of the way and the safety of the public."

The presiding judge refused to rule as requested and gave to the jury the instructions, among others, which are described in the opinion. The jury found the defendant guilty. The defendant alleged exceptions.

Other facts are stated in the opinion.

G. L. Ellsworth, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth, submitted a brief.

HAMMOND, J. The offense described in St. 1909, c. 534, § 16, and charged in the complaint against the defendant, was that of operating an automobile "at a rate of speed greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public"; and this was the only offense. Of course the burden was upon the Commonwealth to prove his guilt.

The section in question, after creating the offense, goes on to provide that in certain localities therein described "a speed exceeding twenty miles per hour for the distance of a quarter of a mile" shall be "*prima facie* evidence of a rate of speed greater than is reasonable and proper," and contains a similar provision as to a rate of speed "exceeding fifteen miles per hour for the distance of one eighth of a mile" in certain other localities. Shortly stated the statute forbids the running of an automobile at a rate of speed greater than is reasonable and proper, and declares what rates of speed shall be *prima facie* evidence of the rate forbidden. It may be remarked in passing that the earlier

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statutes expressly prohibited the running of an automobile at a rate of speed exceeding a certain number of miles per hour therein specified; St. 1902, c. 315, § 1; St. 1903, c. 473, § 8; but a different standard of speed was adopted in St. 1906, c. 412, re-enacted in the present statute.

The real question in all these cases now is whether the speed is greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public, the burden being on the Commonwealth to show that it was. If the speed was such as to make out a *prima facie* case for the prosecution, still the burden does not change. The jury are to give due weight to the *prima facie* case taken in connection with the other circumstances disclosed by the testimony, whether coming from witnesses called by the government or by the defendant, and if they are satisfied that the speed is greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public, they should convict the defendant; otherwise they should acquit him. And hence in some cases a defendant may be convicted even if he has not exceeded the rate named in the *prima facie* clauses of the statute, and in some he may be acquitted even though he may have exceeded it.

The first and third instructions requested by the defendant contained a correct statement of the law so far as respected the offense with which he was charged, and the defendant was entitled to have them given in substance. The trial judge refused to give them, but upon this point, after stating that there was no controversy but that the place where the accident occurred was in the thickly settled portion of the city of Boston, instructed the jury as follows: "If speed greater than fifteen miles an hour is maintained in such a part of the city, then the person is guilty of an offense, — unless what? That is to say, if the government has made that out, it has made out its case, — unless what? Unless the condition at the time required a greater speed. Now is there any evidence here showing that a greater speed would be required? You can see that a rate of speed might be maintained under certain circumstances which would be essential for the safety of the people in the automobile, or for the safety of other people in the street. Conditions might arise under which a very

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high rate of speed would necessarily be maintained for a short time, or short distance, to avoid danger. Unless something of that kind appears, a rate higher than fifteen miles an hour under this statute is an offense. If you are satisfied from the evidence that the speed exceeded fifteen miles an hour, you must find a verdict for the government, unless you are satisfied there were special reasons existing at the time which required a greater speed." And again, near the end of the charge, the following language is used: "The question is essentially this simple thing: Are you satisfied by this evidence beyond a reasonable doubt that the defendant was driving his car at a rate of speed exceeding fifteen miles per hour in a thickly settled part of the city of Boston where there were intersecting ways and for a distance of an eighth of a mile? If he was, and there were no circumstances for the safety of the public or traffic in the road, or special conditions requiring a greater rate of speed, you should return a verdict of guilty. If you are not satisfied of that beyond a reasonable doubt, or are satisfied that there were special circumstances requiring a higher rate of speed, then he is entitled to a verdict of not guilty."

It is manifest that these instructions are not in accordance with the rulings requested by the defendant, which, as we have said, correctly stated the law. Upon this point the defendant's exceptions must be sustained.

The second instruction was rightly refused. The first section of St. 1909, c. 534, contains this provision: "'Intersecting way' shall mean any way which joins another at an angle, whether or not it crosses the other." This provision is found in the section which defines the meanings of various terms thereafter used in the subsequent parts of the statute and, notwithstanding the provisions of the thirty-third section of the statute,* must be held to be applicable to the sixteenth section whenever the latter went into effect.

Exceptions sustained.

* By § 33, all of the statute excepting a number of sections, which went into effect on July 1, 1909, among which § 1 was not, and § 16 was, included, did not take effect until December 31, 1909.

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COMMONWEALTH *vs.* BOSTON WHITE CROSS MILK COMPANY.

Suffolk. March 13, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Milk. Concentrated Milk. Statute, Construction. *Words,* "Milk."

At the trial of an indictment charging the defendant with a violation of R. L. c. 56, § 55, in having in his custody and possession with intent to sell milk to which water had been added, evidence introduced by the Commonwealth tended to show that the defendant was adding water and cream and "concentrated skim milk" to what was called "concentrated milk," and that he had the resultant mixture in his possession with intent to sell it, and that the "concentrated milk" looked like condensed milk. The Commonwealth introduced no evidence as to the composition of "concentrated milk." The defendant contended that the "concentrated milk" was not milk within the meaning of R. L. c. 56, § 55, and put in evidence which tended to show that it was a "manufactured product made from milk as a raw material" and was "a mixture of concentrated skim and pasteurized cream," that in its manufacture the cream was separated from the best fresh cow's milk and was subjected to a process of slow pasteurization which evaporated most of the water in it, destroyed the bacteria and made certain chemical changes which were beneficial; the skimmed milk was treated simultaneously to a process of evaporation, agitation and cooling which removed three fourths of its water, all odors of barns or cows, killed most of the bacteria and made some chemical changes which were beneficial, and the two products thus obtained then were united making "concentrated milk." There was no evidence as to what generally was known or dealt with in the trade as milk, or that "concentrated milk" had come to be known in the trade as milk. Subject to exceptions by the defendant, the trial judge instructed the jury in substance that the only question for them to decide was whether the substance to which the defendant added water was milk within the meaning of the statute, that they were to decide whether that product "which has been shown here, the method of producing which has been described," was "known and treated generally in the trade as milk as it comes from the cow," that if "that product" had "acquired a standing in the trade as milk, then the statute applies to it, and the defendant is guilty for adding water to it." *Held*, that the instructions were erroneous, because, as a matter of law, if the product called "concentrated milk" was produced by the methods described in the evidence, it was not milk within the meaning of the statute.

Since R. L. c. 56, § 55, which among other provisions makes it unlawful to have in one's possession with an intent to sell "milk to which water or any foreign substance has been added," is a penal statute, its scope is not to be extended beyond the natural meaning of its words, and therefore the word "milk" in the statute does not include a product called "concentrated milk" which is described as a "manufactured product made from milk as a raw material" and as "a mixture of concentrated skim and pasteurized cream," and in whose manufacture the

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cream was separated from the best fresh cow's milk and was subjected to a process of slow pasteurization which evaporated most of the water in it, destroyed the bacteria and made certain chemical changes which were beneficial, the skimmed milk was treated simultaneously to a process of evaporation, agitation and cooling which removed three fourths of its water, all odors of barns or cows, killed most of the bacteria and made some chemical changes which were beneficial, and the two products thus obtained then were united.

The word "milk," as used in R. L. c. 56, § 55, making it unlawful to have in one's possession with an intent to sell "milk to which water or any foreign substance has been added," means whole or natural milk of the cow.

The word "milk," as used in R. L. c. 56, § 55, making it unlawful to have in one's possession with an intent to sell "milk to which water or any foreign substance has been added," means the normal unchanged secretion of the mammary glands of one or more healthy cows, containing not less than twelve and fifteen one-hundredths per cent of milk solids, including not less than three and thirty-five one-hundredths per cent of fat.

INDICTMENT, found and returned on July 10, 1909, charging that the defendant on June 21, 1909, "had in its custody and possession with intent to sell milk to which water had been added."

R. L. c. 56, § 55, hereinafter referred to, reads as follows: "Whoever, himself or by his servant or agent, or as the servant or agent of another person, sells, exchanges or delivers, or has in his custody or possession with intent to sell, exchange or deliver or exposes or offers for sale or exchange, adulterated milk or milk to which water or any foreign substance has been added, or milk produced from cows which have been fed on the refuse of distilleries, or from sick or diseased cows, or, as pure milk, milk from which the cream or a part thereof has been removed, and whoever sells, exchanges or delivers or has in his custody or possession with intent to sell, exchange or deliver, skimmed milk containing less than nine and three-tenths per cent of milk solids exclusive of fat, shall for a first offense be punished by a fine of not less than fifty nor more than two hundred dollars, for a second offence by a fine of not less than one hundred nor more than three hundred dollars and for a subsequent offence by a fine of fifty dollars and by imprisonment for not less than sixty nor more than ninety days."

In the Superior Court the case was tried before *Wait*, J. The evidence is summarized in the opinion. At the close of the evidence, the defendant asked the presiding judge to order a verdict of "not guilty," and for the following rulings:

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"2. The word 'milk' in R. L. c. 56, § 55, as used in the phrase 'milk to which water or any foreign substance has been added,' means whole or natural milk of the cow.

"3. The word 'milk' in R. L. c. 56, § 55, as used in the same phrase, 'milk to which water or any foreign substance has been added,' means the normal unchanged secretion of the mammary glands of one or more healthy cows, and containing not less than twelve and fifteen hundredths per cent of milk solids, including not less than three and thirty-five hundredths per cent of fat.

"4. If the jury find that the substance to which the water was added by the defendant was not whole or natural milk of the cow, they must find the defendant not guilty.

"5. The substance to which the water was added by the defendant was not milk within the meaning of the word 'milk' in the phrase, 'milk to which water or any foreign substance has been added,' as used in R. L. c. 56, § 55.

"6. If after the addition of water the resultant mixture was the natural milk of the cow, it could not have been such milk prior to the addition of the water, and the defendant is not guilty.

"7. This indictment was found under R. L. c. 56, § 55. There is a separate section (§ 59) regulating the sale of condensed milk. There is no statute forbidding the adding of water to condensed milk and offering for sale or selling the liquid resulting therefrom."

The presiding judge refused to rule as requested, and submitted the case to the jury with instructions to which the defendant excepted, as stated in the opinion. The jury found the defendant guilty; and the defendant alleged exceptions.

The case was argued at the bar in March, 1911, before *Knowlton*, C. J., *Morton*, *Hammond*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

J. K. Berry, (*E. C. Upton* with him,) for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth, submitted a brief.

SHELDON, J. The indictment charges the defendant with having in its possession with intent to sell "milk to which water had been added." The evidence was to the effect that

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the defendant, having in its possession one hundred and twenty quarts of what was called "concentrated milk," had added thereto three hundred and sixty quarts of ice water, one gallon of heavy cream said to contain forty per cent of milk fat, and four gallons of "concentrated skim milk"; and that the defendant intended to sell the mixture thus prepared.

The government put in no testimony to show what was the composition of the "concentrated milk" which was the basis of the mixture intended to be sold, or how, where, or by whom this basis had been prepared or manufactured, except as follows: There was testimony that this "concentrated extract" looked like condensed milk, that it was white, thick, and of the consistency of molasses, and a half pint bottle containing a thick, white liquid was put in as an exhibit of the "extract"; and it was testified that the "extract" to which the defendant had added water had the appearance of this exhibit. It also appeared that samples of the defendant's product had been taken by an assistant of the inspector of milk and had been analyzed by another assistant. Neither of these assistants testified, and no analysis of the defendant's "concentrated extract or product," or of the mixture when diluted as aforesaid was put in evidence by the government.

The defendant contended that the "concentrated milk" or extract to which it had added water was not milk within the meaning of the statute. It put in evidence of the following alleged facts, which so far as appears were not controverted: The defendant obtained a license under letters patent of the United States for the production and sale of "concentrated milk," and built and equipped a factory for that purpose in Vermont. It bought from farmers in that vicinity the best fresh milk obtainable, such as was by test up to or above the standard fixed by the statutes of this Commonwealth. St. 1908, c. 643. From this milk it separated the cream, and treated separately the cream and the skimmed milk. The cream was treated for some hours to a temperature of not more than one hundred and forty degrees by means of hot water pipes or jackets applied to the containing tanks, with the result that the cream became pasteurized at a temperature lower than that of ordinary pasteurization, the greater part of its water was evaporated. the bacteria

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in it were destroyed, and beneficial changes in it took place, so as to increase the time during which it would remain fresh and sweet, whereby it was purified and yet retained the taste and all the digestive and other qualities of the best fresh cream. The skimmed milk was simultaneously treated in other tanks by a similar application of heat and at the same time agitated and cooled by cold air blasts for about five hours. This brought about the evaporation of at least three fourths of the contained water together with all odor from barns or cows, and killed the most of the bacteria in the milk. The original skimmed milk was thus concentrated and reduced to about one fourth of its original volume and was at the same time purified or pasteurized, but at a low temperature, so that the milk solids were not so far cooked or changed as to make them less digestible or nutritious than in the original milk. The cream and the skimmed milk, thus separately treated, were then in certain proportions carried through pipes into a mixing tank, where they were blended according to a formula, so that the milk solids and the fat should be not less than four times the amount required by our statutes for standard milk and the water should not exceed one fourth part of that allowed for such standard milk. This final product was the "concentrated milk" manufactured by the defendant, to which as aforesaid it added three parts of water, with the intention of selling the mixture thus produced.

Qualified experts also testified for the defendant that the chemical changes produced by the process stated were a mild form or incipient stage of curdling or coagulation of the protein of the milk, like that of the white of a soft boiled egg; that there was some precipitation of the sugar and the phosphatic substances, the water and the gases were driven off, and the bacteria were reduced in number from several hundred thousand down to a few hundreds; that the concentrated product was not milk, but a manufactured product made from milk as a raw material; that the pasteurization process used by the defendant for cream differed from ordinary pasteurization, and the concentration process used for the skimmed milk was different from any method previously known or used for evaporating or condensing milk; and that the defendant's "concentrated

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milk" was not a condensed milk such as was previously known in commerce. One of these witnesses testified that whole or natural milk is milk as it is taken from the cow's udder; that the defendant's product was not milk and was not evaporated milk, which is whole or natural milk with the cream in and evaporated, and that it was not the ordinary condensed milk of commerce, but that he would call it "a mixture of concentrated skim and pasteurized cream."

There was no evidence as to what was generally known or dealt with in the trade as milk.

It appears to have been undisputed that the mixture which the defendant intended to sell, being substantially a mixture of its "concentrated milk" with three parts of water, was fully up to the standard fixed by St. 1908, c. 643, was not adulterated, and had had no water or foreign substance added to it, except, as has been stated, by the addition of three parts of water to one part of the "concentrated milk." It was assumed at the trial that in order to convict the defendant it must be shown that the "concentrated milk" to which the defendant had added water was "milk" within the meaning of R. L. c. 56, § 55.

The judge told the jury that the question was simply this: "Was the substance to which water was added by the defendant . . . milk within the meaning of the particular statute?" He said that milk was the "normal secretion from the mammary glands of the cow substantially in the form in which it is taken from the cow, . . . or any substance generally known or dealt with in the trade as milk as already defined. . . . If cream is generally known in the trade that way it is milk; if chalk and water are generally known in the trade and generally dealt with in the trade as milk, so that when a man says he wants to buy milk, in the trade it is understood chalk and water can be given to him, then that is milk within the language of that statute. But unless chalk and water is so understood, or unless any other product is actually and generally understood in the trade to be the same thing as milk as it comes from the cow, then it is not milk within the statute. . . . That is the question you have got to decide: Was that product which has been shown here, the method of producing which has been described, known and treated generally in the trade as milk as it comes from the

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cow? Could you sell that product just as it stood on a contract which called on you to deliver milk? If you could deliver that product just as it stood, then the defendant is guilty; if you could not, then the defendant is not guilty." And this instruction was repeated more than once, in strong and unmistakable language. In his closing words to the jury, the judge said: "Is this product milk? If it is known in the trade, if it has acquired a standing in the trade as milk, then the statute applies to it, and the defendants are guilty for adding water to it."

It is not contended that the manufactured product of the defendant, to which it added water for reduction and sale, was natural milk as it comes from the cow. And we have searched the evidence in vain for anything upon which it could be found that this manufactured product had come to be known in the trade as milk. Certainly there is no such intimation in the testimony of the government, and that put in by the defendant is wholly to the effect that the defendant's "concentrated milk" was a new and unique product, manufactured only since 1908, under letters patent, at a factory equipped for that purpose, shipped to the defendant's place of business in Boston, and there extended by the defendant and put upon the market only in its diluted form. There is nothing in the evidence tending to show that the concentrated product had been dealt with in the market, or had been a subject of trade, or even had been in the hands of any dealers other than the defendant itself. A contract for the delivery of milk would not be satisfied by the delivery of this concentrated product, which must be diluted by the addition of water before it could be drunk like milk or made available for use as milk in the ordinary manner. It is no more milk within the meaning of such a contract than natural milk which does not come up to the prescribed standard. *Copeland* v. *Boston Dairy Co.* 184 Mass. 207, and 189 Mass. 342. The fact that the word "milk" in this statute has been construed to include cream as one of its natural components (*Commonwealth* v. *Gordon*, 159 Mass. 8) does not indicate that it should include also a substance produced from it by a process of manufacture with artificial appliances involving some chemical changes. The substance itself is not milk, just as butter and cheese and condensed milk are not themselves milk.

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For these reasons the defendant's exceptions to the instructions given to the jury must be sustained.

But as the result thus reached is merely to send the case to a new trial, when the other questions raised by these exceptions would necessarily have to be determined, we deem it proper to consider the fundamental question whether upon the facts here presented a conviction could be supported.

So far as it bears upon this indictment, our statute provides for the punishment of any one who has in his custody or possession with intent to sell "milk to which water . . . has been added." R. L. c. 56, § 55. That is the only offense here charged. It has been suggested that as there is no dispute that the mixture which the defendant produced by adding water to its "concentrated milk" did contain water which had not come from the cow but had been added to the mixture, the mixture itself was within the meaning of the statute milk to which water had been added. But we are unable to accept this argument. If it were sound, then for the same reason one who sold or had in his possession with intent to sell ordinary condensed milk which had been so extended as to resemble natural milk in appearance would be liable to conviction upon a charge like this. But we are dealing with a penal statute, and its scope is not to be extended beyond the natural meaning of its words. When the Legislature dealt with the sale of condensed milk, it used those words. R. L. c. 56, §§ 59, 63. It is claimed, to be sure, that the defendant's product is not condensed milk, but it certainly resembles that other manufactured article more closely than it does natural milk.

Moreover, the object of our statutes regulating the sale of milk, to ensure the supply to consumers of a pure, unadulterated article of a certain nutritive value, is not interfered with by what the defendant has done. As we have seen, it was not denied that the diluted or extended mixture which it intended to sell was fully up to the required standard; it was not contended that it contained any more water, was of any less nutritive value or was less fitted in any respect for a food, than the best natural milk. If, as the evidence tended to show, the process of modified pasteurization to which the manufactured product had been subjected had resulted in greatly diminishing the number of

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bacteria and in prolonging the time during which the extended mixture could safely be kept, this is neither a reason against its use nor an argument for extending the statutory prohibition so as to include a product which is neither within the common meaning of its words nor, so far as now appears, within the mischief which the statute was designed to prevent.

If it should appear in any other case that such a product as this, after having been extended into the form in which it was intended to be sold and used, had been further altered by the addition of water or any other foreign substance, whether by the defendant or by any other person, a different question would be presented. But that is not this case. So, too, if the use of the defendant's product shall be found to involve any danger to the public health, or any risk of fraud being practised by the sale of this manufactured article as milk, the Legislature undoubtedly will make proper provision against such evils. But it is not for us to extend the operation of the present statute beyond its legitimate scope.

The majority of the court are of opinion that if, as upon this bill of exceptions seems to have been the case, it was conceded by the government that the defendant's "concentrated milk" was such a substance, manufactured in such a manner, as appeared by the defendant's evidence, the jury should have been instructed to return a verdict of not guilty. If this was not the case, then the defendant's second and third requests should have been given substantially as asked for.

Exceptions sustained.

COMMONWEALTH *vs.* GRAUSTEIN AND COMPANY.

Suffolk. March 14, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Practice, Criminal, Variance. *Evidence*, Presumptions and burden of proof. *Milk. Corporation*, Liability for misdemeanor. *Words*, "Added," "Whoever."

At the trial of a criminal complaint charging that the defendant in that part of Boston called South Boston had in his possession with intent to sell milk "to which a certain foreign substance, . . . a further description whereof is unknown

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to the complainant," had been added, the chemist of the bureau of milk inspection of Boston, who was not the complainant, properly may testify that the foreign substance was "cow dung," such testimony not constituting a variance, because it is a presumption of fact that the statement in the complaint that "a further description" of the foreign substance was unknown "to the complainant" is true, and the fact that the witness knew its real nature does not as matter of law conclusively rebut that statement.

Even although, at the trial of a criminal complaint charging the defendant therein with having in his possession with intent to sell milk to which "a certain foreign substance, . . . a further description whereof" was unknown to the complainant, had been added, it should appear that the complainant when he swore to the complaint knew that the foreign substance was cow dung, an exception by the defendant to the admission of evidence of the specific character of the foreign substance would not be sustained, because, the essential elements of the crime being stated correctly in the complaint, the variance would not be prejudicial to the defendant.

At the trial of a criminal complaint charging the defendant with a violation of R. L. c. 56, § 55, in that he had in his possession with intent to sell milk to which a certain foreign substance had been added, the jury in answer to a question submitted to them found that the foreign substance was in whole or in part soluble in milk, and thus a contention, strongly urged by the defendant, that the foreign substance was not "added" within the meaning of the statute, unless it was dissolved, was rendered immaterial; but *it was stated* that the court did not intimate that in the absence of such a finding the contention would have been considered tenable.

It is not an essential element of a violation of R. L. c. 56, § 55, which among other things makes it unlawful to have in one's possession with intent to sell milk to which a foreign substance has been added, that the foreign substance should have been added by the previous voluntary act of some person or persons.

Corporations engaged in the business of selling milk are included in the word "whoever" as it is used in R. L. c. 56, § 55, which provides that "Whoever, himself or by his servant or agent, or as the servant or agent of another person, sells, exchanges or delivers, or has in his custody or possession with intent to sell, exchange or deliver or exposes or offers for sale or exchange, adulterated milk or milk to which water or any foreign substance has been added, or milk" of various other descriptions "shall for a first offence be punished by a fine of not less than fifty nor more than two hundred dollars, for a second offence by a fine of not less than one hundred nor more than three hundred dollars and for a subsequent offence by a fine of fifty dollars and by imprisonment for not less than sixty nor more than ninety days."

COMPLAINT, received and sworn to in the Municipal Court of the South Boston District in the City of Boston on December 17, 1909, charging that on December 8, 1909, the defendant within the district of the court "did have in its possession, with intent to sell the same in said Commonwealth, milk to which a certain foreign substance had been and was then and there added, a further description whereof is unknown to the complainant."

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On appeal to the Superior Court, the case was tried before *De Courcy*, J.

It appeared that a sample of milk was taken from an eight quart milk can on a wagon of the defendant and that an analysis was made of it by one Frank E. Mott, the chemist to the bureau of milk inspection of Boston. As to a sediment which he found in the milk, he testified: "From examination of the sediment, both microscopically and chemically, I identified in that sediment animal hairs; there are a few animal hairs. By far the greater part of the sediment, considerably over ninety per cent, is material that passed through the alimentary tract of a cow. . . . In other words, cow dung."

The defendant excepted to the witness being allowed to call the sediment "cow dung," because the complaint alleged that "a further description" of it than that it was "a certain foreign substance" was "unknown to the complainant."

The witness further testified that over ninety per cent of the sediment was material that had passed through the alimentary tract of the cow, cow dung, composed of two chemical substances, cellulose and vasculose, substances that are foreign to milk.

At the close of the evidence, the defendant asked the presiding judge to rule as follows:

"1. That on the evidence produced by the government it has not proved a case against the defendant within the meaning of R. L. c. 56, § 55."

"9. There is not a substance 'added,' within the meaning of the statute, unless there were such an intimate union of the foreign substance with the milk and its elements that the individual parts of the foreign substance lose their individuality in the milk.

"10. That R. L. c. 56, § 55, does not include the prosecution of corporations within its terms directly or constructively."

"12. That the words 'milk to which a foreign substance had been added' as used in the statute means milk to which a foreign substance had been added or caused to be added by the previous voluntary act of some person or persons."

The rulings were refused.

The presiding judge in his instructions to the jury submitted to them the following question, which they answered affirm-

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atively: "If the milk in question was milk to which a foreign substance had been added, was that substance in whole or in part soluble in milk?"

The jury found the defendant guilty; and the defendant alleged exceptions.

The case was submitted on briefs at the sitting of the court in March, 1911, and afterwards was submitted on briefs to all the justices.

J. F. Barry, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

HAMMOND, J. The evidence of Mott that the substance found in the milk consisted in part of "cow dung" was properly admitted. The objection of the defendant that it should have been excluded on the ground of variance is untenable. While it is true that the complaint charges that to the milk there had been added "a certain foreign substance, . . . a further description whereof is unknown to the complainant," still, although some witness called even by the government testified as to the real nature of the substance, it by no means follows as matter of law that at the time the complaint was made the complainant did know its nature. In the absence of any evidence to the contrary the presumption is that a further description was unknown to the complainant at the time the complaint was made. *Commonwealth* v. *Thornton*, 14 Gray, 41. *Commonwealth* v. *Coy*, 157 Mass. 200. And the fact that from knowledge obtained after the complaint was made the government or even the complainant himself could give a further description of the substance is immaterial. And that is so even if the complainant before making the complaint could by reasonable inquiry have been enabled to give a further description. Upon this branch of the case the simple question was whether the allegation that a further description was unknown to the complainant was true. In the absence of evidence to the contrary the presumption is that it was true, but when there is evidence in rebuttal of such presumption then the question is for the jury. *Commonwealth* v. *Thornton*, *ubi supra*. But, even if it be assumed in favor of the defendant that there was a variance, it appears that the essential elements of the crime are correctly stated, and it does not appear that by the variance the defendant

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was prejudiced in its defense; and hence the defendant is not entitled to have this exception sustained. R. L. c. 218, § 35.

Under the instructions the jury must have found that the milk which the defendant had in its possession with intent to sell contained a substance which got into the milk after it had left the cow; that this substance "could have been kept from getting in there by ordinary, reasonable care on the part of the persons handling the milk from the time it left the cow until the time it was delivered to the customer." In answer to a specific question they found that this foreign substance was in whole or in part soluble in milk. It is argued by the defendant that these findings are not warranted by the evidence; but upon considering the evidence in detail we are of opinion that they are.

It is strongly contended by the defendant that the foreign substance must be soluble in the milk. In view of the special finding this question becomes immaterial in this case. We do not mean to intimate, however, that in the absence of such a finding there would have been anything in the contention.

The defendant further contends that the statute applies only to cases where the "foreign substance has been added or caused to be added by the previous voluntary act of some person or persons." So far as material the statute upon which this complaint is founded reads as follows: "Whoever, himself or by his servant or agent, . . . has in his . . . possession with intent to sell, . . . adulterated milk or milk to which water or any foreign substance has been added, or milk produced from cows which have been fed on the refuse of distilleries, or from sick or diseased cows, or, as pure milk, milk from which the cream or a part thereof has been removed, . . . shall . . . be punished."

No extended citation of authorities is needed in support of the proposition that in this class of cases the criminal intent is immaterial. See *Commonwealth* v. *Mixer*, 207 Mass. 141. The history of the milk legislation in this Commonwealth shows conclusively the determination of the law making power to protect the community from adulterated or impure milk. The ultimate purpose is to have pure milk, and to impose upon milk dealers the duty of seeing that the milk be such. In many cases it would be practically impossible to prove that the foreign substance had been purposely added. Nor does it make any differ-

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ence to the consumer in what way it has been added. The intent is to see that impure milk be not sold, irrespective of the question by whom or in what way it became impure. In view of the history of the legislation on this subject, the emphasis placed by the Legislature upon the need of protecting the community from impure milk, and the fact that whether the foreign substance gets into the milk through a positive act intentional or unintentional, or by accident attributable or not to negligence, is entirely immaterial so far as respects the health of the consumer, which is the ultimate thing to be protected, we are of opinion that the statute is not limited to cases where the foreign substance was added by a previous voluntary act of some person. The instructions to the jury upon this point were sufficiently favorable to the defendant. There is nothing inconsistent with this position in *People* v. *Bowen*, 182 N. Y. 1, cited by the defendant.

R. L. c. 8, § 5, provides that the word "'person' may extend and be applied to bodies politic and corporate," "unless a contrary intention clearly appears." Considering the evil intended to be reached by this statute we are of opinion that the word "whoever" includes a corporation like the defendant. See *Commonwealth* v. *Boston & Worcester Railroad*, 11 Cush. 512; *Commonwealth* v. *Boston Advertising Co.* 188 Mass. 348; *Commonwealth* v. *New York Central & Hudson River Railroad*, 206 Mass. 417. The case is clearly distinguishable from *Benson* v. *Monson & Brimfield Manuf. Co.* 9 Met. 562.

Exceptions overruled.

WILLIAM C. TORREY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 14, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Street railway. *Practice, Civil*, Exceptions, Conduct of trial: judge's charge.

In an action by a passenger against a street railway company for personal injuries caused by a box car of the defendant starting as the plaintiff was in the act of alighting, the declaration alleged as the cause of the accident that the car,

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"through and by reason of the negligence and carelessness of the defendant, its agents and servants, was suddenly started" as the plaintiff was in the act of alighting. At the trial of the case, there was evidence tending to show that the plaintiff, who was seventy-five years of age, asked the conductor to stop the car at a certain place and that the conductor gave a signal for that purpose, that, while the car itself was in motion, the plaintiff started for the rear door, that after the car had stopped he started to get off and, while he was doing so, a signal to start the car was given, the car started, and he was thrown; that the conductor at all times was inside the car; that there were no passengers standing inside the car and no one on the rear platform. There was no direct evidence as to who gave the signal to start the car. The presiding judge left the case to the jury with a brief charge, among other things instructing them that in order to find for the plaintiff they must be satisfied "by a fair preponderance of the evidence that the car was suddenly started either because of the ordinary starting signal given by the conductor, or by the motorman without receiving any signal. The plaintiff would not be entitled to recover simply by showing that the car started, and nothing more." The plaintiff, without calling to the judge's attention any specific objections to the charge, excepted generally to the instructions and to rulings therein contained. There was a verdict for the defendant. *Held*, that the exceptions must be overruled, both because the evidence did not justify a finding that the starting signal by bell was given by the conductor or by his direction, and because the charge stated the law tersely and correctly.

TORT for personal injuries alleged to have been caused by the starting of a box street car of the defendant as the plaintiff was in the act of alighting therefrom near the corner of School and Washington Streets in that part of Boston called Dorchester. Writ dated May 5, 1908.

The allegations of the declaration as to the cause of the starting were "that while the plaintiff was in the act of alighting from the said car, and being then and there in the exercise of due care, the said car, through and by reason of the negligence and carelessness of the defendant, its agents and servants, was suddenly started, thereby throwing the plaintiff with great force and violence on his head, back and shoulders on to the stone crossing."

In the Superior Court the case was tried before *Brown*, J.

The entire evidence for the plaintiff as to the cause of the accident was in substance as follows: The plaintiff testified that, while he was sitting in the car about midway between the front and rear and as the car neared the stopping place where he desired to alight, he asked the conductor, who then was inside of the car and was standing just in front of the plaintiff, to stop the car at School Street; that the conductor thereupon gave the

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signal for the car to stop; that the plaintiff at once arose from his seat, while the car was still going, and while the conductor was still near him, and proceeded to the rear platform of the car for the purpose of alighting; that as he reached the rear platform the car stopped at or near the corner of School Street and Washington Street, and that just as he was stepping from the platform, and while he was still on the step, the starting signal was given, two bells being rung, and the car was suddenly started up, throwing him into the street. The plaintiff's daughter, a woman twenty-five years of age, witnessed the accident, and testified that the car did not stop at all after the accident, but proceeded rapidly on its way; that she did not see the conductor or any one on the rear platform except the plaintiff; that, before the plaintiff started to get off, the car had stopped an ordinary length of time. It did not appear that the conductor stepped out on to the rear platform, or that any other person was on the platform besides the plaintiff, at the time the starting signal was given. At the time of the accident the plaintiff was seventy-five years of age.

A conductor on one of the defendant's cars, who was a witness for the defendant, testified upon cross-examination that when the defendant's cars from the Dudley Street terminal station arrived out in Dorchester as far as School Street, the number of passengers on the cars usually were so lessened that none would have to stand up in the cars.

The defendant admitted that it had no report of the accident from its employees and it offered no evidence as to how the accident happened or what transpired at the time of the accident.

On the question of defendant's liability, the presiding judge charged the jury as follows:

"We have got here another of those cases where you have got to determine whether a car started too quickly or not, and whether, if it did, it was the fault of the defendant. The plaintiff has got to show you, by a fair preponderance of all the testimony, first that he was in the exercise of due care, and second that the defendant was negligent.

"In this case the defendant is a corporation engaged in the transportation of passengers for hire, a common carrier of passengers, and as such is obliged to give the greatest care to its

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passengers consistent with the reasonable conduct of its business. The elevated's principal object is rapidly transporting passengers, you and me, from one place to another. The conditions are very different from what they were in the old horse car days. Passengers have got to assume certain risks they didn't assume then; and they do that with full knowledge when they board a car.

"Of course every passenger as a rule is in the exercise of due care. When they have once shown you they are passengers, that they have entrusted their safety to the defendant, they are not obliged to do anything more as a common rule. In this case the plaintiff was in the exercise of due care, from the testimony. He was a passenger going to his home in the evening. He gave the signal to stop the car. His testimony is that the conductor gave the bell, the car stopped, and he started to get off, and that two bells were rung by somebody, he doesn't tell you whom, and he fell.

"Having alleged in his declaration that he was thrown through the fault of the defendant, because its agents and servants were careless in starting that car, he has got to prove it to you. If he has not, he cannot recover. Now you and I have seen, lots of times, other people give signals who had no business to. The plaintiff has got to show you in this case, from the testimony and such inferences as you can draw from it, that these two bells were given by the conductor. If they were not, the defendant is not liable; if they were, it is. You have got to take the testimony and if you can find testimony to substantiate that, you ought to find it. If the testimony is not there, you can't find it; and it is for you to say whether there is any testimony of that sort or not. You heard the plaintiff recalled and you heard what he said. Now if the plaintiff has not shown you that, he cannot recover. If he has, then you have got to determine what happened here. If you find the conductor gave these two bells, did he give them before the plaintiff had a reasonable opportunity to get off? If he did, the defendant is negligent.

"You have got to take all the testimony, and if you can say that the plaintiff on a fair preponderance of the testimony has established those two propositions, his own due care and the

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negligence of the defendant, you come to the question of damages; if you can't, you don't get as far as that in the case."

At the request of the defendant's counsel the presiding judge gave the following additional instruction:

"The plaintiff by his declaration having alleged that, while he was in the act of alighting from the car, the car, through and by reason of the negligence and carelessness of the defendant, or its agents and servants, was suddenly started, must satisfy the jury by a fair preponderance of the evidence that the car was suddenly started either because of the ordinary starting signal given by the conductor, or by the motorman without receiving any signal. The plaintiff would not be entitled to recover simply by showing that the car started, and nothing more."

There was a verdict for the defendant; and the plaintiff alleged exceptions to the rulings and instructions contained in the charge, without specifying which ones.

L. G. Roberts, for the plaintiff.

E. P. Saltonstall & C. W. Blood, for the defendant, were not called upon.

HAMMOND, J. The evidence did not justify a finding that the starting signal by bell was given by the conductor or by his direction.

The charge, though brief, stated the law tersely and correctly, and is not justly open to the criticisms made by the plaintiff that it was contradictory and misleading.

Exceptions overruled.

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PEOPLES NATIONAL BANK OF BOSTON *vs.* NEW ENGLAND HOME FOR DEAF MUTES, AGED, BLIND AND INFIRM.

Suffolk. March 14, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Corporation, Officers. *Bills and Notes.*

The president and the treasurer of a charitable corporation have no power, without special authority, to make a promissory note in the name and behalf of the corporation.

A charitable corporation bought a parcel of real estate, and its trustees passed a vote purporting to authorize the president and treasurer to "execute and sign the necessary papers." The by-laws of the corporation required the presence of two thirds of the whole number of trustees to authorize the purchase and sale of real estate, and only eight of the fifteen trustees were present when the vote was passed. A fraudulent agent acted for the corporation in negotiating a purchase of the real estate, which was paid for and was conveyed to the corporation. He falsely represented the price to be $2,000 more than it was, and agreed to lend this sum of money to the corporation to complete the purchase. For this pretended loan the president and the treasurer executed a note for that amount purporting to be a note of the corporation, which the fraudulent agent assigned to a bank as security for a note of his own. The officers of the corporation did not ascertain the facts until long after the transaction was completed and the corporation had entered into possession of the real estate. In an action by the bank against the corporation on the note, it was *held*, that, assuming the plaintiff to be a holder in due course, so that the defenses that the note was obtained by fraud and that it was without consideration were not open, the defense that the note was not made by the defendant because executed without authority was good, unless the transaction had been ratified, and that it had not been ratified, because the retention of the real estate, although a ratification of the purchase, was not a ratification of the action of the president and treasurer in giving to the fraudulent agent a note which was not a part of the actual purchase of the property.

CONTRACT on a promissory note, executed in the name of the defendant, a charitable corporation organized under R. L. c. 125, and assigned to the plaintiff by the payee, one Mitchell, together with the assignment of an alleged mortgage securing it, as security for a note of Mitchell to the plaintiff for the same amount. Writ dated June 5, 1908.

The note sued upon was as follows:

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Secured by mortgage of real estate in Everett to be recorded in Middlesex Registry of Deeds.

"$2,000. BOSTON, Nov. 8, 1905.

For value received, The New England Home for deaf mutes, aged, blind or infirm, promise to pay to William F. Mitchell or order, the sum of Two Thousand dollars No/100 in 1 year (1) from this date, with interest to be paid semi-annually at the rate of three (3) per centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid.

Signed in presence of:
Archibald MacLean.

New England Home for Deaf Mutes, Aged, Blind or Infirm,
By John Dixwell, M.D.,
President,
and Heber Bishop, Treasurer."

Indorsement on back:
"William F. Mitchell."

In the Superior Court the case was tried before *Dana*, J. The facts shown by the evidence are stated in the opinion. The judge ordered a verdict for the defendant, and, at the request of the plaintiff, reported the case for determination by this court. If the ruling of the judge was right, judgment was to be entered on the verdict. If his ruling was wrong and if this court should be of the opinion that there was sufficient evidence upon which the jury could find that the plaintiff was not a *bona fide* holder of the note for value and without notice, there was to be a new trial. If the ruling of the judge was wrong and this court should be of the opinion that there was no sufficient evidence upon which the jury could find that the plaintiff was not a *bona fide* holder of the note for value and without notice, judgment was to be entered for the plaintiff in such sum as it might be entitled to recover against the defendant upon the pleadings and under the terms of the report.

L. M. Friedman, (*R. Dow* with him,) for the plaintiff.

F. G. Cook, for the defendant.

KNOWLTON, C. J. This is an action upon a promissory note, against a charitable corporation. The note was signed by the corporation's president and treasurer. As officers of such a cor-

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poration, they had no right to make a note without special authority, and on its face the note does not purport to bind the corporation, without proof of their authority to sign it. *Packard* v. *Universalist Society*, 10 Met. 427. *Dedham Institution for Savings* v. *Slack*, 6 Cush. 408. *Craft* v. *South Boston Railroad*, 150 Mass. 207. *Merchants' National Bank of Gardiner* v. *Citizens' Gas Light Co.* 159 Mass. 505. *Jewett* v. *West Somerville Co-operative Bank*, 173 Mass. 54. *Slattery* v. *North End Savings Bank*, 175 Mass. 380.

The vote at the meeting of the trustees did not authorize these officers to make this note. It recited certain terms upon which the real estate had been offered, calling for payment in part by giving certain notes and mortgages, and it purported to authorize the president and treasurer to "execute and sign the necessary papers." The note in suit is not included among these papers. But even more fundamentally, the meeting could give no authority to purchase, lease, or sell real estate, because the by-laws of the corporation require the presence of two thirds of the whole number of trustees to transact that kind of business, and at this meeting only eight of the fifteen trustees were present. Upon the undisputed facts, therefore, the note sued on was not the note of the corporation and no action can be maintained on it, even by a holder in due course, unless the corporation by its subsequent conduct has created a liability upon it.

The plaintiff contends that the defendant has ratified it as a binding note, or has become estopped to deny its validity. The defendant has had no dealings or relations with Mitchell, the payee, which, in connection with its subsequent conduct, amount to a ratification in his favor, or estop it to deny the validity of the note as against him.

Mitchell acted as the agent of the defendant in negotiating a purchase of real estate. He falsely represented the price at which the owner would sell the property, at $2,000 more than it really was. This note of that amount was to reimburse him for a payment of that sum, which he represented that he had made to the owner. In fact, he made no such payment and the note was without consideration. The officers of the corporation did not ascertain the facts until long after the purchase had been completed, and they had entered into possession of the real

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estate. The question is whether the retention of the real estate by the corporation is evidence of a ratification of the note, or of an estoppel against the corporation from denying its validity.

Suppose that the officers ascertained all the facts. Was the corporation bound to give up all the real estate, or ratify this note given without authority? The argument is that a retention of the real estate was inconsistent with a refusal to pay this note. But the defendant did not receive the real estate from Mitchell. It had no dealings with him as a party to the contract whereby it obtained the real estate. His only relation to that transaction was as the agent of the defendant in negotiating for a purchase. The giving of the note was a separate transaction to compensate the payee for a pretended payment. To this note the corporation had three different defenses, — one that it was obtained by fraud, one that it was without consideration, and one that it was not made by the defendant. The first two of these defenses would not avail it as against a holder in due course, but the last is effectual against anybody. As to this, a ratification by the corporation of the transaction conducted by its officers, between it and the former owner of the real estate, whereby it acquired its title, was not inconsistent with a refusal to ratify a merely collateral transaction whereby these officers undertook to borrow $2,000 from Mitchell, and to give him a note and mortgage from the corporation to secure payment of the loan. The corporation and its officers, upon learning all the facts, well might say: We ratify the transaction of our representatives with the former owner of the property, whereby the land was acquired; but we decline to ratify their action in giving a note to our fraudulent agent, which did not enter into the transaction with the former owner from whom we obtained our property.

We are of opinion that there is no evidence of ratification by the corporation, of the giving of this note, much less is there any estoppel against it.

Judgment on the verdict.

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JOHAN O. ANDERSON *vs.* J. N. SMITH.

Suffolk. March 14, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

If the superintendent of a proprietor of teams, which are used for loading manure at a place called "the dump" and transporting it to other places, tells the driver of one of the teams to take two designated men with him to the dump and load manure, sending there also at the same time another team with two men, and if, after loading at the dump, the second team gets stuck owing to the softness of the ground, and the driver of the first team unhitches his horses, and, handling the reins himself, orders the two men sent with him each to hitch one of the horses in front of the pole horses of the other team as leaders, and, after one of the horses has been so hitched, and when the man who was told to hitch the other horse is in the act of coupling the whiffletree to the loop on that side of the pole by means of a hook and chain, the driver, who still is handling the reins, strikes that leader with his whip, whereupon the horse jumps, and the man's finger is caught between the hook and the loop or ring and is injured, in an action by the injured man against the proprietor of the teams under R. L. c. 106, § 71, cl. 2, a verdict must be directed for the defendant, because the driver, who gave the order to the plaintiff and afterwards struck the horse with the whip, was not a person "whose sole or principal duty was that of superintendence," nor was he a person who "in the absence of such superintendent was acting as superintendent with the authority or consent" of the defendant; and, if there was negligence in striking the horse with the whip, it was that of a fellow servant of the plaintiff.

TORT for personal injuries sustained by the plaintiff while in the employ of the defendant on January 15, 1908, at the defendant's place of business, called the dump, in that part of Boston called South Boston, the declaration containing two counts, the first at common law, alleging a failure to furnish the plaintiff with a safe place to work and suitable appliances, and the second under R. L. c. 106, § 71, cl. 2, alleging negligence of a person in the service of the defendant who was entrusted with and was exercising superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of the defendant. Writ dated February 14, 1908.

In the Superior Court the case was tried before *White,* J. The plaintiff waived the first count of his declaration and relied

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upon the second count. It was admitted by the defendant that sufficient notice in writing was given by the plaintiff to the defendant under the employers' liability act. It also was admitted by the defendant that one Dodd was the superintendent in the employ of the defendant.

The plaintiff testified in his direct examination that on the day on which the injury occurred he was in the employ of the defendant, that he had been working in Cambridge unloading manure in the forenoon, that after dinner Dodd, the superintendent, told one Sullivan to take the plaintiff and one Dahlquist to the dump and load manure; that when they arrived at the dump Sullivan and the plaintiff loaded up Sullivan's team with manure and one Curran and Dahlquist loaded Curran's team; that Sullivan's team first was taken up on the street, that Sullivan subsequently unhitched his horses, driving them himself down to where Curran's team was standing for the purpose of assisting Curran's team up to the street, owing to the softness of the ground where the team was loading; that Sullivan then ordered the plaintiff to hitch his, Sullivan's, left leading horse and Dahlquist to hitch the right leading horse to the pole horses of Curran's team while he, Sullivan, was handling the reins; that Dahlquist then hitched Sullivan's right horse to Curran's right pole horse and the plaintiff then tried to hitch Sullivan's left horse to Curran's left pole horse by taking hold of the whiffletree of the left horse of Sullivan's horses, and was at the time standing near the rear on the right hand side of Sullivan's left leading horse near the front legs of Curran's left pole horse; that while the plaintiff was in the act of coupling the whiffletree to the loop underneath the pole by means of a hook and chain, Sullivan struck his left leading horse with his whip, whereupon the horse jumped and the plaintiff's right index finger got caught between the hook and the loop or ring and was crushed.

The plaintiff further testified that Sullivan stood on the left hand side of his left leading horse near the rear of the horse about three or four feet away from the plaintiff at the time the injury occurred and that he could plainly see what the plaintiff was doing from where he was standing; that the plaintiff was in the act of doing what Sullivan had ordered him to do when

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Sullivan struck the horse and the injury occurred; and that no one but Sullivan handled the reins of his horses from the time he unhitched them from his own team on the street up to the time of the injury.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant, and, by consent of the parties, reported the case for determination by this court, upon the stipulation of the parties that, if the ruling of the judge was right, judgment was to be entered on the verdict, and that, if it was wrong, judgment was to be entered for the plaintiff in the sum of $500.

C. H. Johnson, for the plaintiff, submitted a brief.

W. H. Hitchcock, (*C. M. Pratt* with him,) for the defendant.

HAMMOND, J. The first count of the declaration was waived and the case went to trial solely on the second.

The evidence tended to show that while the plaintiff, being in the employ of the defendant, was attempting to hitch a leading horse to a cart, and was in the act of coupling the whiffletree to the loop underneath the pole by means of a hook and chain, one Sullivan, who as the defendant's servant was handling the reins, struck the horse with his whip, causing the horse to jump, by reason whereof the plaintiff's right index finger was caught between the hook and the loop or ring and was crushed.

The question is whether the evidence would warrant a finding that for this act of Sullivan the defendant is answerable to the plaintiff. It is very plain he is not. Even if, without deciding, it be assumed in favor of the plaintiff that, in directing the plaintiff to hitch the horse to the pole, Sullivan was exercising a kind of superintendence, still it is perfectly obvious that he was not a person "whose sole or principal duty was that of superintendence." See *O'Neil* v. *O'Leary*, 164 Mass. 387. Nor can it be said that he was a person who "in the absence of such superintendent was acting as superintendent with the authority or consent" of the defendant. *Carney* v. *A. B. Clark Co.* 207 Mass. 200. Dodd was the regular superintendent and was acting as such. He was not absent within the meaning of R. L. c. 106, § 71, cl. 2. If there was any negligence it was that of Sullivan, the plaintiff's fellow servant, for which neither at com-

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mon law nor under the statute was the defendant answerable. *O'Connor* v. *Roberts*, 120 Mass. 227. *Carney* v. *A. B. Clark Co.*, *ubi supra*.

Judgment for the defendant on the verdict.

FREDERICK J. MYERS *vs.* BOSTON AND MAINE RAILROAD.
PATRICK J. MYERS *vs.* SAME.

Suffolk. March 15, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Licensee.

A boy eight years of age, who with another boy enters an empty railroad car used for the transportation of milk to fill a bag with pieces of ice by permission of an agent or manager of a milk company, that leases from the railroad corporation the premises adjoining the track on which the car is standing, and is injured by reason of the car being started suddenly by servants of the railroad corporation, is in the relation toward the railroad corporation of a mere licensee at the most, and cannot maintain an action for his injuries against that corporation in the absence of evidence of wanton or reckless conduct on the part of its servants.

TWO ACTIONS OF TORT, the first for personal injuries sustained by the plaintiff, a minor, and the second by the father of the plaintiff in the first case for the loss of his services. Writs dated March 16, 1907.

In the Superior Court the cases were tried together before *White*, J. It appeared that on July 19, 1906, the plaintiff in the first case, hereinafter called the plaintiff, received injuries, which necessitated the amputation of his right leg just below the knee, while in an empty car of the defendant on a track adjacent to the premises occupied by H. P. Hood and Sons' milk depot on Rutherford Avenue in that part of Boston called Charlestown, the place where that company received milk consigned to it. The premises were adjacent to the tracks of the defendant and were leased by H. P. Hood and Sons from the defendant.

The jury took a view of the premises where the accident occurred. They consisted of a large paved driveway with buildings

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and sheds which were used for the storage of milk and there were tracks running from the defendant's railroad into the yard, the tracks running alongside the platforms of the sheds. The place where the accident occurred was adjacent to the platform of the shed on the right of the driveway as one enters. This driveway, as well as the track on which the accident happened, was owned by the defendant and did not come within the lease. The tracks ran from the railroad into this driveway and alongside the shed to a point about one hundred and fifty or two hundred feet from the end of the platform. At the end of the track there was a bunter, so called, which consisted of several large pieces of timber which were braced together so as to prevent the cars on the track from going beyond the point at which the bunter was placed. A car used for the transportation of milk, which was the type of car in which the plaintiff was at the time of the accident, is similar to an ordinary passenger coach in its external appearance with the exception that there are no windows in it. There were platforms at each end of the car with steps leading therefrom and there were doors at each end and on the sides of the car.

It appeared that the plaintiff at the time of the accident on July 19, 1906, was about eight years old; that he was living on Main Street, about a quarter of a mile from the Hood yard; that before the day of the accident he had been down at the Hood yard a half dozen times or more; that on the day of the accident he, with a boy named Leary, went to the yard where they met another boy named Marr; that the Leary boy had a bag with him and that when they got to the Hood yard the plaintiff applied to a man for permission to take ice from an empty car which was standing on the track before mentioned. The plaintiff described the man as "a man standing around there, was a boss, all dressed up, bossing the men." This description was given on the offer to prove that the man addressed was a person in charge or a manager for H. P. Hood and Sons. In response to the plaintiff's request for permission to take the ice from the empty car the plaintiff testified that this man said to him and to the Leary boy, "Yes, go up there to that car. There is an empty car up there and there is some ice on the floor of it." Whereupon the plaintiff and the Leary

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boy entered the car, which was standing on the track running alongside the shed warehouse in which the milk was placed after being taken from the cars. The plaintiff took the bag that the Leary boy had and both of them were putting ice into it. When the bag was half filled with ice a man came to the door of the car and said to the plaintiff, "Come on here, kids, we are going to pull this car out in ten minutes," to which the plaintiff and the other boy replied, "All right, sir," and immediately the plaintiff helped Leary to put the bag on Leary's back and started for the end door of the car, which was the door nearest to the bunter; that when he was at a point about two or three feet away from the doorway itself "the car gave a bang. . . . It knocked me around and then another bang came and knocked me on the bunter so that I landed in a sitting position through the open door, hit my foot and squashed it. . . . I got thrown out and it sat me right on the bunter. The car came on it quick. I do not remember much at all after that."

At the close of the plaintiffs' evidence, the judge ruled that as matter of law the plaintiffs were not entitled to recover, and ordered verdicts for the defendant. The plaintiffs alleged exceptions.

The cases were submitted on briefs.

D. H. Coakley & A. Harrington, for the plaintiffs.

A. R. Tisdale, for the defendant.

HAMMOND, J. These are two actions of tort, the first being for personal injuries sustained by a minor, and the second by his father for loss of services of the minor. The actions were tried together.

There is no evidence that the minor was invited into the car by any one representing or having the right to act for the defendant; and he was therefore at the most a mere licensee. The measure of the defendant's duty was to refrain from wanton or reckless conduct tending to injure him. There was no evidence of such conduct.

The order directing verdicts for the defendant was correct. In each case the entry must be

Exceptions overruled.

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ANDREA DE ANGELO *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 15, 1911. — May 18, 1911.

President: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

A man of full age in the employ of a corporation, who in obedience to an order of a superintendent is cleaning a pump in the boiler room of a power house, while the wheels of the machine are in motion, with a piece of cotton waste which has been given him for the purpose, assumes the obvious risk of an injury from the cotton waste, and with it his hand, being drawn in between a large cog-wheel and an iron guard by the wind created by the motion of the wheel, and his employer is under no duty to warn him of such a danger.

TORT for personal injuries alleged to have been sustained by the plaintiff on December 1, 1906, when he was in the employ of the defendant and in obedience to an order of a superintendent of the defendant was cleaning a pump in the boiler room of a power house of the defendant in Boston, while the machine was in motion. The declaration contained four counts, but the plaintiff elected to rely upon the first and third counts, the first, at common law, alleging a failure to give the plaintiff proper instructions and to warn him of dangers not known to or appreciated by him, and the third under R. L. c. 106, § 71, cl. 2, alleging negligence of a superintendent. Writ dated March 12, 1907.

In the Superior Court the case was tried before *Brown*, J. The plaintiff testified, among other things, that he was an Italian thirty-one years of age; that on the day before the accident he had been working for the defendant on a coal barge at the defendant's Lincoln power station shovelling coal; that he had been five or six months in the United States before the accident; that in Italy he was a farmer; that after coming to this country and before working for the defendant he had worked digging trenches for sewer pipes; that he had been working two or three days in the coal barge at the Lincoln power station before the accident; that on the morning of the accident he had been working at the boat from seven to half past seven o'clock; that after that he went to work in the station to shovel coal and

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cinders and worked on that three hours; that a man named Fisher spoke to him while he was doing that work; that Fisher "did not work, but bossed;" that Fisher took him to the next room and gave him some cotton waste and told him to clean the whole machine; that Fisher did not tell him anything else; that he first cleaned away the oil around the machine; that he then took two steps up and began to clean other parts of the machine; that the machine was in motion all the time; that he never had seen the machine before and never had worked on such a machine; that he began to clean the big cog-wheel and the iron guard in front of it; that the big wheel moving around caused a wind which drew the waste in between the guard and the big cog-wheel, and thus drew in the plaintiff's fingers; that he saw the waste going in but that there was no time to let go; that he had been working five or six minutes on that part of the machine before the accident happened, and that he did not understand the danger of the wind or know that it would suck in the waste.

At the close of the plaintiff's evidence, the judge ordered a verdict for the defendant, and reported the case for determination by this court, with a stipulation of the parties that, if upon all the evidence, including such as was excluded improperly against objection and exception and excluding such as was admitted improperly against objection and exception, the judge was wrong in ordering a verdict for the defendant, judgment should be entered for the plaintiff in the sum of $1,000; otherwise, that judgment should be entered on the verdict.

F. P. Garland, for the plaintiff.

W. G. Thompson, (*F. D. Putnam* with him,) for the defendant.

HAMMOND, J. The plaintiff was given a piece of cotton waste and told to clean a large machine while the wheels were in motion. While he was doing the work, the waste was drawn in between the large wheel and an iron guard by wind caused by the revolution of the wheel, and before the plaintiff let go his left hand was drawn in and injured.

The plaintiff says he was ignorant of the danger of his hands being drawn in, and that the defendant or the superintendent who gave the order was negligent in not informing him of this danger.

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The plaintiff was a man of full age. The danger of having his hand drawn in was plain and obvious and the defendant had no reason to anticipate that the plaintiff needed instructions, nor was he under any duty to give him warning. See *Chmiel* v. *Thorndike Co.* 182 Mass. 112, and cases cited.

Judgment on the verdict.

JOHN J. MAGNER *vs.* BOSTON ELEVATED RAILWAY COMPANY.
SARAH A. CONNORS *vs.* SAME.

Suffolk. March 15, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Negligence, In use of highway, Due care of plaintiff.

A person, who stops on a crosswalk at the corner of two city streets to allow a team to pass him and during this momentary pause fails to look around and is struck and injured by a street car which comes around the corner from the intersecting street without sounding any gong or bell, is not necessarily negligent, and in an action against the corporation operating the street railway for his injuries thus caused, in which there is evidence of negligence on the part of the defendant, he may be entitled to have the question whether he was in the exercise of due care submitted to the jury.

TWO ACTIONS OF TORT for personal injuries sustained on February 25, 1908, from being knocked down by a street car owned and operated by the defendant. Writs dated June 19 and October 21, 1908.

In the Superior Court the cases were tried together before *Lawton*, J. The plaintiff in the first case testified that he was a plumber, whose place of employment was on Essex Street in Boston; that on the day of the accident he had been with the plaintiff in the second case to a jewelry store to get a locket repaired; and that they came down Beach Street from Washington Street to Harrison Avenue.

He then testified as follows: "I had got about half ways across Harrison Avenue in Beach Street when a big double-horse team came around the corner, and there is a double set of tracks on Beach Street and there was a car, a Charlestown car, came up Harrison Avenue from Essex Street to go to the South

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Station. When I crossed the street I couldn't get any nearer to this wagon unless I wanted to get run over. This car came up Harrison Avenue, turned the corner and never rang the bell or anything; I never knew he was there until the car hit me and knocked me down. As it hit me it hit me on the left leg right at the muscle and I fell. I fell that way. And then the step hit me again and threw me, and then Miss Connors was thrown also."

The plaintiff in the second case testified that she was employed in a clerical position on Lincoln Street in Boston; that the accident happened at about noontime; that she, walking with the plaintiff in the first case, came down Washington Street to Beach Street and then started to walk on Beach Street toward Kingston Street. She then testified as follows: "Well, we were walking along and we got there at the curbstone, and there was a two-horse team, a large two-horse team, coming along, and of course we had to wait there, we couldn't go by, and a car came down Harrison Avenue and I didn't hear no bell or nothing — there was nothing rung until Mr. Magner was knocked down by the car and threw me down." She was not struck by the car, but the plaintiff in the first case was knocked against her and she went down.

It was testified that the plaintiff in the first case broke a rib and sustained other injuries and that the plaintiff in the second case sustained a severe nervous shock.

At the close of the plaintiffs' evidence, the judge ruled that there was no evidence that the plaintiffs were in the exercise of due care, and that the plaintiffs could not recover. He ordered a verdict for the defendant in each case; and the plaintiffs alleged exceptions.

The case was argued at the bar in March, 1911, before *Knowlton*, C. J., *Morton*, *Hammond*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

J. J. Mansfield, (*J. J. Gearin* with him,) for the plaintiffs.

J. E. Hannigan, for the defendant.

SHELDON, J. While these cases are very close, the majority of the court are of opinion that they should have been left to the jury. The plaintiffs were not necessarily negligent in starting to cross Harrison Avenue as they were passing along Beach

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Street. Their stopping on the crossing to allow a team to pass in front of them could be found to have been merely a proper act of precaution. Their failure to look around during this momentary pause was not decisive of negligence. *Murphy* v. *Armstrong Transfer Co.* 167 Mass. 199, and cases cited. The cases differ from *Byrne* v. *Boston Elevated Railway*, 198 Mass. 444, *Callaghan* v. *Boston Elevated Railway*, 200 Mass. 450, or *Smith* v. *Boston Elevated Railway*, 202 Mass. 489. See *Hennessey* v. *Taylor*, 189 Mass. 583; *Hunt* v. *Old Colony Street Railway*, 206 Mass. 11; *Kerr* v. *Boston Elevated Railway*, 188 Mass. 434; *Silva* v. *Boston Elevated Railway*, 188 Mass. 249; *Howland* v. *Union Street Railway*, 150 Mass. 86. The case last cited closely resembles those now before us.

It does not appear to have been disputed that there was evidence of negligence for which the defendant was responsible.

Exceptions sustained.

MARGARET A. O'LEARY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 17, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Practice, Civil, Conduct of trial: redirect examination of witness, requests and rulings, Exceptions. *Evidence,* Relevancy and materiality.

At the trial of an action against a street railway company by a girl six years of age, when injured, to recover for personal injuries caused by the plaintiff being run into by a car of the defendant as she was crossing a street, the plaintiff testified in direct examination that she saw the car approaching, that it slowed down and then suddenly increased its speed and caught her before she could escape. In cross-examination she testified that when she first saw the car she was eight feet away. In redirect examination she was asked, "If you saw the car coming just before you stepped along to go over the tracks on which the car was, why didn't you keep out of the way of the car?" and answered, "I moved out of the way and then it came swifter and knocked me down." On motion of the defendant and subject to an exception by the plaintiff the answer was stricken out as not responsive to the question. The presiding judge then gave the plaintiff leave to testify anew as to all the circumstances of the accident, and, she appearing tired, allowed her to rest while other witnesses were testifying. Before the afternoon adjournment of the court the defendant's counsel stated that, if the plaintiff was to testify further, he desired it to be

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done before adjournment "and not in the morning after there has been a chance to talk with her." Thereupon the plaintiff's counsel stated: "I won't put her on after that remark." In answer to a special question, the jury found that the plaintiff was in the exercise of due care. *Held*, that the plaintiff's exception should not be sustained, because the answer stricken out was made immaterial on the question of the plaintiff's due care by the finding of the jury, and was a repetition on the question of negligence of the motorman; and because the plaintiff was given an opportunity to go over the matter again and did not do so.

A judge presiding at a jury trial cannot be required to give a ruling which singles out only some of the facts bearing upon the issues being tried and states the law with regard thereto.

TORT for personal injuries caused by the plaintiff, a girl six years of age, being run over by a car of the defendant at the intersection of Fourth and O Streets in that part of Boston called South Boston. Writ dated May 7, 1907.

In the Superior Court the case was tried before *Brown*, J. The plaintiff testified in direct examination that, as she was crossing Fourth Street, the defendant's car was approaching; that the motorman slowed down at first as he approached the crossing and then suddenly increased his speed at a time when the plaintiff was unable to protect herself, and that thereby she was caught and injured.

In her cross-examination the plaintiff testified that when she first saw the car she was eight feet from the track, and that when she next saw it she was four feet away. In redirect examination the question stated in the opinion was asked and answered, and then, subject to an exception by the plaintiff, the answer was stricken out by the presiding judge as not responsive to the question. The presiding judge, however, ruled that the plaintiff might testify again in full as to the relative positions of herself and of the car before the car struck her. The plaintiff's counsel then asked her a number of questions to which she made no reply, and, she having told the judge that she wanted to rest awhile, he ruled that she might. Other witnesses thereupon testified, and, near the close of the afternoon session, the defendant's counsel stated, "If this little girl is going to testify, I want it before the court closes to-night, and not in the morning after there has been a chance to talk with her"; to which the plaintiff's counsel replied, "I won't put her on after that remark."

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At the close of the evidence, the plaintiff asked for the following ruling, which the judge refused to give:

"If, when the plaintiff started to cross the street, the car was going slowly enough so that she might have crossed safely, and she was injured by reason of a sudden increase in speed caused by the motorman, the jury should take those facts into consideration both upon the question of the plaintiff's due care and the defendant's negligence."

The judge submitted the following questions to the jury, which they answered as follows:

"1. Was Margaret A. O'Leary, on April 22, 1907, in the exercise of that degree of care which may reasonably be expected of children of her age and capacity? Yes.

"Was the motorman negligent? No.

"What damages did Margaret A. O'Leary suffer by reason of this accident? $300."

Thereupon the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

W. M. Noble & A. L. Doggett, for the plaintiff.

F. Ranney & E. B. Horn, for the defendant.

HAMMOND, J. The plaintiff alleges two exceptions, the first to the striking out by the court of an answer given by her on redirect examination, and the second to the refusal of the court to give a ruling requested by the plaintiff.

1. As to the striking out of the answer. The question and answer were as follows:

"Q. If you saw the car coming just before you stepped along to go over the tracks on which the car was, why didn't you keep out of the way of the car?

"A. I moved out of the way, and then it came swifter and knocked me down."

The answer was excluded by the presiding judge as not responsive to the question. So far as the answer bore upon the question of the due care of the plaintiff, it has become immaterial by the finding of the jury that the plaintiff was in the exercise of due care. So far as it bore on the question of the negligence of the motorman the statement that the car "came swifter" added nothing to what the plaintiff had said previously

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upon the stand, and hence even if the answer was responsive its exclusion is not shown to have been harmful to the plaintiff.

But the decisive answer to this exception is that as a result of a colloquy of considerable length, in which the judge and the counsel on each side participated, the counsel for the plaintiff was allowed to go all over the matter in detail as much as he pleased, but he declined to avail himself fully of the privilege. For this reason the exception must be overruled.

2. As to the ruling requested. The request singled out only some of the facts bearing upon the questions of the plaintiff's due care and the defendant's negligence. The judge was not bound to make the selection in the language of the request. The charge was specific and full enough upon these questions.

Exceptions overruled.

WILLIAM C. E. O'BRIEN *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. March 17, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability, Railroad.

Where, at the trial of an action under R. L. c. 106, § 71, cl. 1, against a railroad corporation by a freight brakeman in its employ, to recover for personal injuries caused by the sudden unwinding of a brake wheel due to the slipping of a dog which held the ratchet as he was winding up the brake, there is evidence that the ratchet was defective in that one tooth was not cut in so deep as the others, which would cause the dog to be forced out and not to hold much pressure, and the plaintiff's description of the manner in which the accident happened might be found to have been more consistent with the presence of a defective tooth in the ratchet than with any other cause, and there also is evidence that such ratchets are in common use on railroads, it is for the jury to say whether, in view of the way in which such ratchets are made and of their common use on railroads, the short tooth constituted a defect which the defendant in the exercise of due care and diligence ought to have discovered and remedied.

If a freight brakeman in the employ of a railroad company is injured because of a defect, consisting of a short tooth in the ratchet on the braking apparatus of a freight car, the mere fact that such ratchets are in common use will not excuse the defendant from liability under R. L. c. 106, § 71, cl. 1, if it does not appear that the brakeman assumed the risk of the injury.

If, at the trial of an action under R. L. c. 106, § 71, cl. 1, against a railroad corporation by a freight brakeman in its employ, to recover for personal injuries caused by the sudden unwinding of a brake wheel, caused by the slipping of a dog

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which held the ratchet as the plaintiff was winding up the brake, there is evidence that the ratchet was defective in that one tooth was not cut in so deep as the others, which would cause the dog to be forced out and not to hold much pressure, and the plaintiff testifies that he did not see any defect in the ratchet or dog before he began using them, and there is further evidence that the plaintiff's duties were those of a member of a car-shifting crew, which required him to jump on and off cars in motion and to ride cars which had been "kicked" off from trains in train yards until, by braking them, he brought them to a standstill, the question, whether the plaintiff was in the exercise of due care, is for the jury.

If, at the trial of an action under R. L. c. 106, § 71, cl. 1, against a railroad corporation by a freight brakeman in its employ, to recover for personal injuries caused by the sudden unwinding of a brake wheel, caused by the slipping of a dog which held the ratchet as the plaintiff was winding up the brake, there is evidence that the ratchet was defective in that one tooth was not cut in so deep as the others, which would cause the dog to be forced out and not to hold much pressure, and the plaintiff testifies that he did not see any defect in the ratchet or dog before he began using them, and there is further evidence that the plaintiff's duties were those of a member of a car-shifting crew, which required him to jump on and off cars in motion and to ride cars which had been "kicked" off from trains in train yards until, by braking them, he brought them to a standstill, and it appears that ratchets with such short teeth were in common use on railroads, the questions, whether the plaintiff assumed the risk of the injury he received because he knew that the ratchet was or might be defective or because a defective ratchet was so common and well known as to constitute one of the obvious risks of the employment, or whether in the performance of his duties he properly could rely upon the assumption that the brake was in a condition to enable him to do his work in safety, and, if so, to what extent he was justified in acting upon such reliance, all were for the jury.

If a freight brakeman, who in the course of his duties is upon a loaded freight car which has been "kicked" from a train in its course over switches to a position in a freight yard, and whose duty it is by use of the hand brake to bring the car to a standstill at the proper point, as he starts to use the brake for the first time observes that it is defective, so that he has before him the alternative of attempting to use it, employing such care as he is able to under the circumstances, or of abandoning the car to its fate with the certainty that it would come into collision with other cars, *it is doubtful* whether it can be said as matter of law that the brakeman, in deciding to use the brake, would assume the risk of injury therefrom. By MORTON, J.

TORT for personal injuries received while in the employ of the defendant as a brakeman and alleged to have been caused by a defective ratchet and dog upon the braking appliance of a freight car which in the course of his duties the plaintiff was attempting to stop with the brake. Writ dated January 9, 1907.

In the Superior Court the case was tried before *Brown*, J. The plaintiff testified that at the time of the accident he had worked for the defendant for five years continuously as a freight brakeman, and that at the time he was injured he was working on

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a shifting crew. It was his duty among other things to ride cars that had been kicked off from the engine to their place of destination on side tracks, to make up freight trains and distribute cars, and to do general shifting work. This shifting work required him to jump on to moving cars that had been kicked off by the engine. Sometimes he would have one car, and at other times four or five to take care of.

On June 14, 1906, at the time of the accident, he with others of the shifting crew was just getting through his morning's work. The engine was shifting out a string of cars, that is, hauling them up over switches and "kicking" them down to the different tracks. "We had a string of seven or eight cars. As the first car of the string came down I was on top of it. The car . . . was loaded, and I rode on the top of it from the North Farm to the new yard, something like one third of a mile to where I got injured. Where I got injured was in the new yard near track No. 6. The side tracks lead off the main line tracks. The car was cut off and was going down to track No. 8. . . I was setting up a brake at the time of the accident. There is a small platform about a foot wide some two feet below the roof of the car on which the brakeman stands as he sets the brake up. The brake shaft starts at the bottom part of the car and goes right clean up the whole length of the car to the top, and there is a brake wheel on top of the shaft. About two feet below the top of the roof of the car on the shaft there is a dog and a ratchet, which is used to hold the brake. This dog and ratchet is right on top of the small platform. The ratchet is a round piece of iron with teeth cut in it, and the dog is a piece of iron, shaped something like the letter S, which fits into the teeth when you set the brake up, to hold the dog and hold the car. When you were setting the brake wheel up for the purpose of stopping the car the brakeman puts his foot up against the dog so that it will catch into the teeth of the ratchet, and this holds the brake. The shoe against the wheels of the car is attached to this brake by a chain which runs from the shoe to the shaft, and every time you pull on that brake it tightens the shoe against the wheels, and the dog fitting into the ratchet holds it."

The plaintiff's description of the manner in which the accident happened is stated in the opinion. He also testified that,

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as he looked at the dog and ratchet before getting upon the platform, he saw nothing wrong with them.

The defendant produced what it alleged was the brake whose defect the plaintiff contended caused his injury. It was examined on behalf of the plaintiff by an experienced brakeman, who testified that there was one tooth upon the ratchet which was defective by reason of the fact that it was not cut in so deep as the others, so that it had a tendency to force the dog out of place and would not hold under pressure.

The car with the alleged defective brake was the property of the Wabash Railroad. It had been received by the defendant on June 7, 1906, from the Delaware and Hudson River Railroad Company, when it was loaded with automobiles for Beverly Farms, Massachusetts, where it was unloaded on June 12. Thereafter, up to the time of the accident on June 14, it was used by the defendant for a trip to Sanbornville, New Hampshire, from whence it was returning, loaded with ice, when the plaintiff was injured.

The disposition of the case in the trial court is stated in the opinion.

S. A. Fuller, (*J. W. Vaughan*, with him,) for the plaintiff.

H. F. Hurlburt, Jr., for the defendant.

MORTON, J. This is an action of tort to recover damages for personal injuries received by the plaintiff on June 14, 1906, while in the employ of the defendant as a freight brakeman. At the close of the plaintiff's evidence the trial judge directed a verdict for the defendant and reported the case to this court. If the judge was wrong in directing a verdict for the defendant it is agreed that judgment may be entered for the plaintiff in the amount stipulated in writing by the parties; otherwise judgment is to be entered upon the verdict.

We think that the ruling was wrong. There was evidence tending to show that there was a defect in the ratchet so that the dog which held the brake as it was wound up was liable to slip, and did slip, thereby causing the accident complained of. One witness called by the plaintiff testified that the ratchet was defective and that it had a tendency to throw the dog out and that it would not hold under pressure. The plaintiff's description of the manner in which the accident happened also could

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have been found to be more consistent with the presence of a defective tooth in the ratchet than with any other cause. He testified amongst other things that he was winding up the brake and had his foot against the dog, meaning, it could be fairly inferred, that he was pressing the dog into the ratchet, and had got the brake "pretty well tightened up," "pretty near up to the limit," and looked round over his shoulder to see where the cars ahead of him were, when "the dog gave away from me, and as the dog gave away from me the brake went off, it unwound, and down I went, it went off just as quick as that," illustrating by clapping his hands. The defendant contends that the plaintiff, as he turned to look at the cars that were ahead of him, may have moved his foot and thereby released the dog, or the joggling of the car as it went over the switch may have thrown out the dog, or that in winding up the brake chain one part of the chain wound upon another and then may have slipped off, causing the sudden unwinding; and that it is impossible therefore to tell what the cause of the accident was. All these things were matters proper for the consideration of the jury in passing upon the question whether the accident was due, as contended by the plaintiff, to a defect in the ratchet or to some other cause for which the defendant was not liable; but they did not justify a ruling that there was no defect in the ratchet, and that the accident was not due to that. It was for the jury to say whether in view of the way in which ratchets such as this were made and of their common use on other railroads, the short tooth complained of, if there was one, constituted a defect for which the defendant was liable. If it was a defect, the fact that such ratchets were in common use would not excuse the defendant if it did not appear that the plaintiff had assumed the risk. So also it was a question for the jury whether, if it were a defect, it ought in the exercise of the care and diligence required of it to have been discovered and remedied by the defendant.

It could not have been ruled as matter of law that the plaintiff was not in the exercise of due care, or that he assumed the risk. It was for the jury to say whether, taking into account the nature of his duties and of the business in which he was engaged, he exercised the degree of care which under the circumstances was required of him. So as to assumption of the risk, it was for

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the jury to say whether he knew that the ratchet was or might be defective and, if he did, whether he assumed the risk of it, and whether a defective ratchet was so common and well known as to constitute one of the obvious risks of the employment, or whether in the performance of his duties he could properly rely upon the assumption that the brake was in a condition to enable him to do his work in safety, and if so to what extent he was justified in acting upon such reliance. Even if in the instant of stepping down upon the platform to wind up the brake he had discovered the defect and had before him the alternative of attempting to wind up the brake, using such care as he was able to use under the circumstances, or of abandoning the car to its fate with the certainty that it would collide with the cars ahead, it is doubtful, to say the least, whether it could have been ruled as matter of law that he would have assumed the risk arising from the defective brake. That question however is not now before us.

We have not found it necessary to consider the questions of evidence.

In accordance with the report the entry must be: Judgment for the plaintiff in the amount agreed upon in writing by the parties.

So ordered.

LOUIS B. RIDENOUR *vs.* H. C. DEXTER CHAIR COMPANY.

Suffolk. March 20, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Practice, Civil, New trial, Exceptions, Requests and rulings. *Frauds, Statute of. Payment. Accord and Satisfaction. Pleading, Civil*, Answer. *Practice, Civil*, Exceptions.

The denial, by the judge who presided at a trial, of a motion for a new trial where the party who made the motion contended that the jury must have disregarded the judge's instructions, is discretionary and is not subject to exception.

A request for a ruling, that upon all the evidence at a trial a verdict for the plaintiff is unwarranted, comes too late, when made at the hearing of a motion for a new trial after a verdict has been returned for the plaintiff, because such a question should have been raised before the verdict.

In an action for the value of services as a salesman, rendered by the plaintiff to the defendant, the defendant filed a declaration in set-off for a sum largely in excess

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of the amount claimed by the plaintiff. At the trial the items of the declaration and of the declaration in set-off were conceded to be true, and the plaintiff contended and, without objection on the part of the defendant, introduced evidence tending to show that he had made an oral agreement with the defendant by which his salary as salesman was increased during a certain period of a number of years then passed, the increase being applied in payment of the amount claimed in the declaration in set-off. The defendant contended that the agreement, not being in writing, was void because of the statute of frauds. *Held*, that under the circumstances the statute could not be relied on and did not operate to prevent the plaintiff from receiving, for services which he had rendered under the agreement, the discharge of the defendant's claim, although such an agreement had not been made in writing.

At the trial of an action against a corporation for services as a salesman, the defendant filed a declaration in set-off. It appeared that the plaintiff had purchased shares of the capital stock of the defendant and had given therefor his note payable to the defendant's acting treasurer, who was at the same time its president, a member of its board of directors, the owner of a majority of its capital stock and practically in sole control of the corporation. The treasurer indorsed the note and thereafter the amount of interest that was paid thereon was charged to the plaintiff in his account with the company. These payments of interest constituted the items in the declaration in set-off. There was evidence that thereafter the plaintiff made an agreement with the company whereby he was to receive an increase of salary, the increase to be applied toward payment of the note, and that after several years, in an accounting between the plaintiff and the treasurer, acting for the defendant, it was agreed that a small balance due from the plaintiff to the defendant in his general account should be cancelled, that the plaintiff should be credited with the amount due to him on account of the reserved increase of salary, which amount exceeded the amount of the note and the interest items, and that the note should be returned to him discharged. The note was returned to him. *Held*, that a finding, that a settlement was made between the plaintiff and the defendant by which the note and all of the items of the declaration in set-off were paid, was warranted.

If, at the trial of an action of contract where the plaintiff, in defense to a declaration in set-off, his answer to which has been merely general denial and payment, introduces in evidence an auditor's report which states that the items in the declaration in set-off had been included in a settlement between the parties and were discharged thereby, and the defendant does not object to the report on the ground that the plaintiff had not pleaded an accord and satisfaction and does not call that defect in the pleadings to the attention of the presiding judge, the defendant cannot rely upon such defect in this court for the first time on exceptions to the refusal of the trial judge to give certain rulings which did not in terms mention it.

CONTRACT, with a declaration, as amended, in three counts, the first and second for $1,331.47 for commissions alleged to have been earned by the plaintiff as a salesman, and the third for $225, claimed as a share of profits in a branch of the defendant's business alleged to be due to the plaintiff under an oral contract between him and the defendant. Writ in the Municipal Court of the City of Boston dated March 24, 1908.

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There was a declaration in set-off in two counts, the first count, as amended, claiming $1,971.54 on an account annexed, and the second count, also upon an account annexed, claiming $3,321.71.

There were answers of general denial and payment both to the declaration and to the declaration in set-off.

On appeal to the Superior Court, the case was referred to Hollis R. Bailey, Esquire, as auditor. Among other findings in the report were the following:

The plaintiff from the year 1897 to early in the year 1908 was in the employ of H. C. Dexter and of the defendant as a travelling salesman and otherwise. The defendant was incorporated in the year 1900 and was engaged principally in the manufacture of furniture, having its factory and principal place of business at Black River, in the State of New York. Henry C. Dexter owned a majority of the stock and was a director and also the president and the general manager and the acting treasurer. He practically had the entire control of the affairs of the company.

It was not disputed that in April, 1900, when the company was organized, the plaintiff took twenty-five shares of stock and gave Dexter his note for $2,500, payable on demand with interest at six per cent, with the twenty-five shares of stock as collateral; and that in October of the same year he took twenty-five additional shares and gave Dexter a second note for $2,500, payable on demand with interest at six per cent. Dexter indorsed the notes and placed them with a bank in Watertown, New York. The interest was paid by Dexter as it became due and was charged to the plaintiff in his general account. No dividends ever were declared by the company. In March, 1907, the first of the notes was taken up by Dexter from the bank and returned with the twenty-five shares of stock to the plaintiff. In January, 1908, the second of the notes was taken up by Dexter from the then holder and was returned to the plaintiff, the twenty-five shares of stock being retained by Dexter. The circumstances attending this settlement of the notes were in dispute.

The plaintiff's contention before the auditor in regard to the note transactions was that it was agreed in December, 1902, be-

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tween Dexter and himself that he, Ridenour, should for the year 1903 receive $1,000 a year additional salary to be applied toward paying the notes; that this arrangement continued until the end of the year 1906, when a new arrangement was made; that in December, 1905, it further was agreed that during 1906 he should be allowed certain additional commissions earned on outside business, the same to be collected by Dexter and credited to him on his general account; that the first note with the stock was returned to him in March, 1907, by reason of the fact that the extra salary for the years 1903 to 1906 inclusive was more than enough to pay the note; that in November, 1907, talk was had about the remaining note and about the 1906 account, and that Dexter gave to him a statement showing the extra commission for 1906, amounting to $1,610.36, credited on his general account, and $150 paid by Ridenour in 1904 also credited, leaving the balance due on the general account January 1, 1907, $340.96; that Dexter then was willing to settle the account and the remaining note, he, Dexter, keeping the stock, waiving the balance of $340.96, and taking up and returning to the plaintiff the remaining note; that the plaintiff was not then willing to concede so much, but finally in the January following concluded to settle on the basis above stated, and that the last note was thereupon returned to him and the twenty-five shares of stock retained by Dexter.

The defendant contended before the auditor that there was talk in December, 1902, of an increase of salary of $1,000 per year to apply on the notes but that no agreement ever was arrived at and that no increase of salary took effect; that the additional commissions for 1906, $1,610.36 and $150, were to apply on the notes and not on the general account; that there was no waiver of the balance of $340.96 and no settlement of the general account for 1906; that the second note was paid by the plaintiff giving up the twenty-five shares of stock, and that the first note was only paid to the extent of the $1,610.36 and $150, leaving a balance of about $800 still due on account of the first note.

The auditor then stated that there were two questions to be determined, (1) Whether there was an agreement in 1902 or thereafter for an additional salary of $1,000 per year for the years 1903–1906 to apply on the notes? (2) Whether there

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finally was a settlement of the general account in connection with the note transactions?

After reciting at length the evidence bearing on these questions, much of which consisted of letters which passed between the parties, the auditor found (1) that there was an agreement in 1902 or thereafter for an additional salary of $1,000 per year for the years 1903, 1904, 1905 and 1906 to apply on the notes; (2) that there finally was a settlement of the general account in connection with the note transactions; (3) that there was nothing due to the defendant under its declaration in set-off; (4) that the plaintiff was entitled to recover on the first two counts $795.39, and on the third count $179.61, with interest on both sums.

The report contained no reference to any statute of frauds being introduced in evidence or relied on by the defendant.

The case was tried in the Superior Court before *Raymond*, J. The plaintiff relied solely on the auditor's report. The defendant called Dexter and introduced in evidence the New York statute of frauds. The evidence as to the New York statute of frauds was the last evidence offered in point of time, and no objection to evidence on the ground of the statute was made during the trial or before the auditor, nor was any reference to the statute made in the pleadings. There was no reference to the Massachusetts statute of frauds until the requests for rulings.

At the close of the evidence the defendant asked for the following rulings:

"(1) That upon the evidence as to the law of New York, the alleged contract of 1903 was a contract not to be performed within a year from the time of its making and was null and void because not subscribed by this defendant.

"(2) That under the law of Massachusetts the alleged contract for 1903 would be within the statute of frauds of an agreement not to be performed within a year and would not be binding upon the defendant.

"(3) That there is no sufficient evidence in the case to warrant the jury in finding that any agreement was made by the defendant fixing the salary of the plaintiff for the years 1903, 1904, 1905 and 1906 in excess of $2,200.

"(4) That there is no sufficient evidence in the case to war-

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rant the jury in finding that the plaintiff became entitled to receive from the defendant as compensation for his services for 1903, 1904, 1905 and 1906 any sum in excess of $2,200 per year and the special commissions with which his account was credited by the defendant.

"(5) That there is no sufficient evidence in the case to warrant the jury in finding that the amount claimed by the defendant in its set-off less the credits admitted by it has been paid.

"(6) That there is no issue upon the pleadings as to whether the note of April 2, 1900, was paid by the defendant company, and the evidence relating to its payment out of a supposed reserved salary is wholly immaterial. If the note was paid by the defendant for account of plaintiff out of reserved earnings not credited to the plaintiff, such payment could not affect in any way the items that were charged upon the books."

"(9) That if the jury should find that the April note was paid by the corporation at plaintiff's request applying to the payment the remittance of $150 from Washington and the commission credit of $1,610.36, such payment would not affect the amount due by plaintiff upon his general account and in the absence of further testimony would require a finding for the defendant for the amount of its set-off; but if said sums were not applied by the defendant company to the payment of the April note, but were applied to plaintiff's general account as a payment therein, the defendant would be entitled to a finding upon its set-off of the difference between the two amounts, being $340.96."

The presiding judge refused to rule as requested.

The only portions of the charge which were stated in the bill of exceptions were the following:

The jury were instructed "that the statute of frauds did not apply to the case, and they need not consider it, and further . . . that there was no increase in salary unless the parties agreed together to increase the salary. That it was not necessary for this case that the conversation which they held or the writing which they passed on that point should be produced and shown. That they had a right to find an increase from all the facts as they were developed in the trial. That if there was a contract to increase the salary from $2,200 to $3,200 that that agreement entered vitally into a finding on the general accounts. That

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they might consider the series of letters that were in evidence, the personal testimony of Mr. Dexter bearing upon them, the credibility of the testimony given by Mr. Dexter, his failure to reply to plaintiff's letters in determining whether or not there had been any increase in salary.

"After calling the jury's attention to the letter of January 17, 1906, and the defendant's reply of January 20, 1906, the judge said 'Yes, there was a response on January 20, in which Mr. Dexter refers particularly to the letter of January 17, and says in regard to the statement of account, "I cannot just now give you the same," and goes on to state reasons why he cannot. I call to your attention that letter and ask you to examine it particularly and see from that in connection with the other (January 17, 1906) whether or not the agreement was treated as an existing agreement between the parties.'"

The jury found for the plaintiff in the sum of $1,071.69. The defendant moved for a new trial, as stated in the opinion. The motion was overruled. The defendant alleged exceptions to the rulings at the trial and at the hearing of the motion for a new trial.

Other facts are stated in the opinion.

The case was submitted on briefs.

W. C. Cogswell & J. H. Appleton, for the defendant.

J. Comerford, for the plaintiff.

BRALEY, J. The refusal to grant a new trial on the defendant's motion, that the jury must have disregarded the instructions, was discretionary, and cannot be reviewed on exceptions. *Lord* v. *Rowse*, 195 Mass. 216, 219, 220. Its further request, that upon all the evidence the verdict was unwarranted, sought to raise a question which was not open, as it should have been raised before verdict. *Loveland* v. *Rand*, 200 Mass. 142, 144.

The exceptions taken at the trial relate to the refusal to rule as requested, and to the instructions.

It was conceded, that the amount found by the auditor, to whom the case was referred, was due the plaintiff, but the defendant having declared in set-off for a much larger sum, the items of which were admitted to be correct, the controversy before the jury was confined to the single issue, as to whether the counter claim had been discharged by payment.

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The auditor states at length the business transactions between the parties. In the year of the defendant's corporate organization, the plaintiff, who was in its employment as a salesman, became the owner of fifty shares of the capital stock, which was sold and issued to him by the company. To obtain the money to pay for the stock, he gave two promissory notes, payable on demand to the order of the president, who acted as treasurer and general manager. The notes were discounted by the treasurer at a national bank, who paid the interest as it became due, and charged the payments to the plaintiff in his general account in the company's books. It was the plaintiff's contention, that while the notes were outstanding, it was agreed that his salary should be increased, the excess to be reserved and applied in payment of the notes, and the auditor so found. If the memorandum in writing of the agreement was not signed by the parties, and the contract was oral, and not to be performed within one year from its date, the defendant did not object to the admission of the unsigned agreement or of the auditor's report in evidence, but only sought to control and rebut the report by the evidence of its treasurer, that no agreement was ever made. The question at the trial was not whether the plaintiff could have enforced the contract by an independent action, if the statute of frauds of the State of New York or our own statute had been pleaded in bar. It was, whether the defendant agreed to apply in liquidation the reserved salary, even if the agreement might be unenforceable. The contract moreover had been executed and nothing remained to be done except to apply the money in payment. The first and second requests were rightly refused.

It appears from the report, that after much correspondence, and many interviews between the plaintiff and the treasurer as to the plaintiff's contractual relations with the company, his liability on the general account, and the disposition which should be made of the notes, the plaintiff and the defendant's treasurer met to adjust the indebtedness, and settle their differences. If the jury accepted the report, they were warranted in finding that the conclusions reached by the auditor, that the general account which is the subject of the set-off was adjusted in connection with the settlement of the notes, were right, and that there was nothing due the defendant. We find no error in the refusal to

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give the third, fourth and fifth requests. The sum reserved appears to have been largely in excess of the amount required to pay the notes and the general account after the partial payments made by the plaintiff upon the first note were properly credited, and the authority of the treasurer to bind the defendant does not seem to have been disputed. Indeed from his own evidence he had practically the sole control of the company, and if the company's books did not show the reserved salary, which the report states had accrued at the date of settlement, the plaintiff could not be deprived of what the treasurer is found to have conceded was justly due him. If the plaintiff had admitted the correctness of the general statement, he was indebted to the defendant for the balance then shown to be due on the account. But he did not admit that he owed anything. The offer of the treasurer to settle the notes and the general account by waiving the balance, which the auditor finds the plaintiff accepted, accordingly operated as a liquidation and discharge of the debt. *Donohue* v. *Woodbury*, 6 Cush. 148. *Tompkins* v. *Hill*, 145 Mass. 379.

It is now contended that the settlement could not be shown, as an accord and satisfaction had not been pleaded. But the defendant neither objected to the report which was the only evidence of the settlement, nor suggested that the defense was not open under the answer. If relied upon, it should have been called to the attention of the presiding judge, when the plaintiff doubtless would have been given an opportunity to amend. *Ouligan* v. *Butler*, 189 Mass. 287, 289. It cannot for the first time raise a question of pleading in this court on exceptions to the refusal of the presiding judge to give requests which, without calling his attention to the point required him in effect to rule, that the plaintiff's defense was not open on the evidence. *Burnett* v. *Smith*, 4 Gray, 50, 52, 53. *Jones* v. *Sisson*, 5 Gray, 288, 294. *Jones* v. *Wolcott*, 15 Gray, 541, 542. *Wall* v. *Provident Institution for Savings*, 3 Allen, 96, 98. *McLean* v. *Richardson*, 127 Mass. 339, 344. *Carpenter* v. *Fisher*, 175 Mass. 9, 14. Nor is it material that the exceptions state that reference may be had to the pleadings. *Bass* v. *Edwards*, 126 Mass. 445. It, moreover, may be said of the ninth request, that it ignored the explicit finding of the auditor, and the judge was not required to

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instruct on a part of the evidence. *American Tube Works* v. *Tucker*, 185 Mass. 236. The sixth and ninth requests could not properly have been given.

No error appears in the instructions to the jury so far as argued. The charge is not fully reported, but the expression that the jury "had the right to find an increase from all the facts as they were developed at the trial" should be read with the preceding statement, that there was no increase of salary unless the jury found a mutual agreement of the parties. The province of the jury was not invaded by any expression of opinion by the judge which disclosed a bias in favor of the plaintiff. *Whitney* v. *Wellesley & Boston Street Railway*, 197 Mass. 495.

Exceptions overruled.

MARGARET MULLEN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 27, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Street railway, In use of highway.

At the trial of an action by a girl twelve years of age, when injured, against a street railway corporation there was evidence tending to show that, as the plaintiff, coming from a street upon which there were no tracks, approached double tracks of the defendant upon an intersecting street, she saw a car approaching on the nearer track some distance away and that it appeared to her to be "slowing down," that she saw a heavy team approaching from the opposite direction on the farther track at a walk, that thereupon she started to cross the tracks and that she would have crossed in safety, had not the driver of the team suddenly whipped up his horses just as she reached the nearer track, upon which the street car was approaching, and that, upon the driver doing this, she became confused, hesitated and was run into by the street car. The view of the motorman of the car was unobstructed. *Held*, that the plaintiff had a right to assume that the driver of the wagon and the motorman of the car would use reasonable care to avoid running her down, and that the questions, whether the plaintiff was in the exercise of due care and whether the motorman was negligent, were for the jury.

TORT for personal injuries caused by the plaintiff, a child twelve years of age, being struck by a car of the defendant at

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the corner of Williams Street and Shawmut Avenue in Boston. Writ dated July 18, 1907.

In the Superior Court the case was tried before *Harris*, J. Shawmut Avenue runs northerly and southerly. The street railway track designated as "inward" in the opinion was on the easterly side of Shawmut Avenue, and that designated "outward" was on the westerly side. The plaintiff's evidence tended to show that she was crossing Shawmut Avenue from the east, thus approaching first the inward track.

Other facts are stated in the opinion.

At the close of the evidence the defendant asked for a ruling that upon all the evidence the plaintiff was not entitled to a verdict. The ruling was refused. The jury found for the plaintiff in the sum of $1,500; and the defendant alleged exceptions.

J. E. Hannigan, for the defendant.

W. Flaherty, (*J. P. Walsh* with him,) for the plaintiff.

BRALEY, J. The evidence is irreconcilable. But the jury could have found from the plaintiff's testimony, that she was walking on the crosswalk over the plaintiff's track, after having looked when at the curbstone and seen the car some distance away on the inward track, which appeared to be "slowing down," and a heavy team approaching at a walk from the opposite direction on the outward track. It was not, as matter of law, negligence for her to attempt to cross from one side of the street to the other. *Wood* v. *Boston Elevated Railway*, 188 Mass. 161. *Silva* v. *Boston Elevated Railway*, 188 Mass. 249. *Coleman* v. *Lowell, Lawrence & Haverhill Street Railway*, 181 Mass. 591. *Creavin* v. *Newton Street Railway*, 176 Mass. 529. *Driscoll* v. *West End Street Railway*, 159 Mass. 142. And the plaintiff had the right to assume that the motorman and the driver of the team would use reasonable care to avoid running her down. *Jeddrey* v. *Boston & Northern Street Railway*, 198 Mass. 232, 234. *Hennessey* v. *Taylor*, 189 Mass. 583, 586. *Finnick* v. *Boston & Northern Street Railway*, 190 Mass. 382, 386. *Murphy* v. *Armstrong Transfer Co.* 167 Mass. 199, 201. It further could have been found that the plaintiff would have passed ahead of the wagon, and over in safety, if the driver had not suddenly whipped up his horses just as she reached the inward track, and placed her in a dangerous position where she hesi-

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tated whether to go forward, or to turn back, and while in doubt she was struck by the car. The occurrence was not extraordinary, but merely an incident likely to arise in the concurrent use of our streets by different classes of travellers, where street cars also are operated. The plaintiff was twelve years of age, and it was for the jury to determine whether, when thus beset, she acted with reasonable prudence. *O'Brien* v. *Lexington & Boston Street Railway*, 205 Mass. 182, 184. The question of the defendant's negligence was also for the jury. The view of the motorman was unobstructed, and the car was being operated not with an exclusive right of way, but subject to the exigencies of public travel. *Eustis* v. *Boston Elevated Railway*, 206 Mass. 143, 144, and cases cited.

Exceptions overruled.

JAYME M. D'ALMEIDA, administrator, *vs.* BOSTON AND MAINE RAILROAD.

SAME *vs.* BOOTT MILLS.

Middlesex. March 27, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Employer's liability, Railroad.

If a mill corporation receives from a railroad corporation a car belonging to the railroad corporation and loaded with coal for the mill, and under the sole control of the mill corporation and by its employees the car is moved over tracks of the railroad corporation to tracks of the mill corporation and on to its premises, dumped, and returned to the railroad corporation, the car, during the time that it is thus in the control of the mill corporation, is a part of its appliances and of its ways, works or machinery, and that corporation is liable both at common law and under St. 1909, c. 514, Part I. § 127, cl. 1, for personal injuries received by an employee by reason of a defect in the car which could have been discovered by reasonable diligence.

A mill corporation received from a railroad corporation a certain car belonging to the railroad corporation and loaded with coal for the mill, and under the sole control of the mill corporation and by its employees the car was moved over tracks to its premises to be dumped. The car was of a variety called a coal dump car, its body being arranged to tip either to one side or to the other of the car and thus to dump its contents, while, when the car was loaded, the body was held in an upright position by a combination of links, dogs, hangers and wooden floor beams. The method employed by the mill corporation's superintendent to

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get the car upon its premises was to start it with some speed toward a curve and then to let it go by its own momentum, a brakeman in the employ of the mill corporation being upon it so that its speed could be checked at the right moment. The superintendent knew that it was necessary that the apparatus which held the car body in place should be able to stand the lateral strain caused by the car striking the curve at speed, and that otherwise the load would be dumped and the brakeman injured. Before the car in question was started toward the curve the superintendent by looking at the ends of the car ascertained that the apparatus in question was in place. He did not discover that the apparatus was, as to its materials, defective and unable to stand the strain to be put upon it, facts which he would have discovered if he had made an examination of the apparatus under the car. By reason of such defects, the apparatus gave way on the curve, the car dumped its contents and the brakeman received injuries from which he died. *Held*, that such failure of the superintendent to discover the defects might be found to be negligence for which the mill corporation might be found to be liable under St. 1909, c. 514, Part I. § 127, cl. 2, § 128, for the conscious suffering and death of the brakeman.

If an employee of a mill corporation receives fatal injuries by reason of a defect in a car which a railroad corporation owns and has delivered to the mill corporation under an arrangement between them, and the existence and failure to discover the defect are due both to negligence of the mill corporation and of the railroad corporation, separate actions may be maintained for such injuries and death respectively against the mill corporation at common law and under St. 1909, c. 514, Part I. §§ 127, 128, and against the railroad corporation at common law and under St. 1906, c. 463, Part I. § 63, St. 1907, c. 392, although there can be only one satisfaction in damages; and a jury may be permitted to find a verdict in the action against the mill corporation of $3,300 for the death and $200 for conscious suffering; and a verdict of $6,300 in the action for death against the railroad corporation.

If a railroad corporation transports a car, which it owns and which is loaded with coal, entirely on its own lines to and into the sole control of a mill corporation with the understanding that the mill corporation by its employees shall move the car over tracks to a coal pocket upon its premises, dump it and return it to the railroad corporation, the railroad corporation is liable at common law for personal injuries and under St. 1906, c. 463, Part I. § 63, St. 1907, c. 392, for the death of an employee of the mill corporation who is injured by reason of a defect in the car which would have been discovered if the car had been thoroughly inspected before it was delivered to the mill corporation.

TWO ACTIONS OF TORT by the administrator of the estate of Joao de Gouvea. The first action sought recovery under St. 1906, c. 463, Part I. § 63, as amended by St. 1907, c. 392, for the death of the plaintiff's intestate, an employee of the defendant in the second action, who was killed on October 21, 1909, on Amory Street in Lowell by the overturning of a coal dump car belonging to the defendant railroad company. The second action was in three counts, the first count for death and conscious suffering of the plaintiff's intestate, alleged to have been caused by a

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defect in the ways, works or machinery of the defendant Boott Mills, a manufacturing corporation, and for which it was responsible under St. 1909, c. 514, § 127, cl. 1, § 128; the second count under § 127, cl. 2, § 128 of the same statute, alleging the cause of the injury and death to be negligence of a superintendent of the defendant; and the third at common law for conscious suffering of the plaintiff's intestate. Writs dated January 24, 1910.

In the Superior Court the cases and one other, by the same plaintiff against the railroad company to recover for conscious suffering of the plaintiff's intestate, were tried together before *Fox*, J.

The following is a description of the car from which the plaintiff's intestate fell, and of the manner in which the accident happened.

The car was an ordinary four-wheel coal dump car about fifteen feet long by six feet high, holding four and one half tons of coal. Its body balanced on its truck, being attached thereto by a circular or rocker bar front and rear so arranged as to allow the body to dump to either side. When not being dumped, four iron links measuring about eighteen inches by four inches, one at each corner of the body, engaged four anvil shaped dogs on the truck, the engagement of a link and dog on each corner being designed to prevent the body from tipping. Each link was attached at its upper end to the body or box part of the car by means of a small iron casting about six inches long by three inches wide, called a "hanger," which was bolted in a vertical position to the side of the beam in the floor of the body, such beam being parallel with and six or eight inches inside of the outside sill, each hanger being attached to its beam by two iron bolts, placed one above the other and running horizontally through the beam. Through the middle of the hanger between the two bolts was a groove through which the upper end of the link was suspended in such a manner that the link was free to swing from its bearing upward or downward in the groove. When the four links were in their usual position over the dogs on the truck the body of the car could not be tipped to either side, but when the car was to be dumped to one side or the other, the two links on the side opposite that toward which the

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car was to be dumped were lifted upward by hand off the dogs and the body of the car was then free to tip on the two rockers in the desired direction. When the car was properly equipped an iron weight was attached to the lower part of each link designed to prevent its accidentally jarring off the dog. The car on which Gouvea, the plaintiff's intestate, was riding was started by means of the horses, and after the tag had been removed and either at the moment when the car reached the curve or just after that time and while it was still upon the curve, the car body tipped to the right, Gouvea, who was, as above stated, standing on the beam of the body, tipped with it, attempted to jump and was caught by the car body as he did so and was thrown in such a way that the wheels of the truck, which at all times remained on the track, passed over him.

Other facts are stated in the opinion.

At the close of the evidence the defendant, the Boott Mills, made seven requests for rulings. The first four, which, subject to exceptions by that defendant, were refused by the presiding judge, were to the effect that upon all the evidence the plaintiff was not entitled to recover upon any or all of the counts of the declaration. The sixth and seventh requests are immaterial because exceptions to their refusal have been waived.

The defendant railroad corporation asked for the following rulings which, subject to its exception, were refused by the presiding judge.

"1. There is not sufficient evidence to justify a verdict for the plaintiff.

"2. After the Boston and Maine Railroad had left the car on Amory Street, it was the duty of the Boott Mills of Lowell to inspect the car before its men ran the car from the scales to its destination in the coal shed.

"3. After the car had reached a place where it was the duty of another to inspect it before moving it, there was no further liability of the railroad for any defect in the car which could have been discovered on inspection.

"4. Upon the evidence, the car at the time of the accident was an instrument of the Boott Mills in its business, and the Boston and Maine Railroad is not liable for injuries to an employee of the Boott Mills resulting from a defect in the car.

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"5. Upon the evidence, the car at the time of the accident was a part of the ways, works and machinery of the Boott Mills in its business, and the Boston and Maine Railroad is not liable for injuries to an employee of the Boott Mills resulting from a defect in the car.

"6. The Boston and Maine Railroad is not liable because of the fact that it had notice that cars were operated by the employees of the Boott Mills in the same manner as the car in the accident.

"7. The jury should disregard the evidence tending to show that the Boston and Maine Railroad knew that the employees of the Boott Mills operated cars in the manner that the car was operated at the time of the accident.

"8. The Boott Mills and the Boston and Maine Railroad cannot be held liable on the evidence as joint tortfeasors."

In the first case, which was for death only, the jury found for the plaintiff in the sum of $6,300.

In the second case the jury found for the plaintiff in the sum of $3,500, of which $3,300 was for the death of the plaintiff's intestate, and $200 for his conscious suffering.

The defendants severally alleged exceptions.

F. N. Wier, (*L. T. Trull* with him,) for the Boston and Maine Railroad.

F. E. Dunbar, (*J. J. Rogers* with him,) for the Boott Mills.

S. E. Qua, (*F. W. Qua* with him,) for the plaintiff.

BRALEY, J. The plaintiff's intestate while working for the mills as a brakeman in the management of a dump car loaded with coal, suffered injuries by the sudden and premature overturning of the car when in transit, from which after a short period of conscious suffering he died. It is conceded, that the car was defective and unsafe, and the questions are, whether there was evidence of negligence on the part of the respective defendants, or of the intestate's due care.

We first consider the exceptions of the mills. The railroad owned the car, which with other cars filled with coal consigned to the mills, had been left on a side track near the premises, and from there they were drawn by horses over a spur track into the defendant's yard, and unloaded at the coal pocket. The work of moving and unloading was under the sole control of the mills,

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whose employees then returned the cars to the railroad. The railroad also owned and maintained that part of the spur track where the accident happened. The defendant manifestly was using the car for the purposes of its own business, and it formed part of its works as if it had been constructed or hired for the purpose. *Foster* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 21. *McNamara* v. *Boston & Maine Railroad*, 202 Mass. 491. If the defendant provided an unsuitable car, or a car the defects in which could have been discovered by reasonable diligence, its duty to the intestate had not been discharged, either at common law or under the statute. *Cormo* v. *Boston Bridge Works*, 205 Mass. 866. *Ruddy* v. *George F. Blake Manuf. Co.* 205 Mass. 172. *Feeney* v. *York Manuf. Co.* 189 Mass. 886. St. 1909, c. 514, § 127. This question was properly left to the jury under suitable instructions. The work was performed under the supervision of the foreman of the mills, who, the jury could find, had been entrusted with superintendence. *Murphy* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 18. It was shown, that three of the four cast iron hangers on the car, to which the links were attached, were so cracked "as to be in two parts." The links engaged the dogs, and if the dogs did not hold securely, the car, which was of the "rocker type," might tip and overturn. It also was in evidence, that the wooden floor beam holding the hanger which gave way appeared to be cracked, old and rotten, and was so discolored as to indicate that the split had existed for some time. The defendant's foreman, called by the plaintiff, testified, that as the cars had to turn a sharp curve before reaching the coal pocket, they were given a momentum after leaving the side track and before arriving at the spur track where the horses were detached, which would cause them to "strike the curve . . . at a speed of seven or eight miles an hour." He further said, that the cars could not safely be switched and passed over the curve unless in charge of an employee whose control of the brake would prevent the car from running into the bumper or leaving the track as it approached the pocket. The strain from the lateral motion in rounding the curve, and the speed required, were circumstances known and appreciated by the foreman, who was present directing the work. Before the horses were attached and the car

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started, he observed that the links at each end engaged the dogs but made no further effort to ascertain the car's general condition. It does not seem to have been questioned at the trial that a further examination would have been ineffective unless the dumping attachments, which were underneath the car, had been inspected. The jury, however, could have found that the defects were not concealed, and would have been discovered if a thorough examination had been made, and that in failing to take this reasonable precaution before placing the intestate in a position, where if the car, and particularly the dumping apparatus, was not sound he would be exposed to great bodily peril, the foreman was negligent. *Coffee* v. *New York, New Haven, & Hartford Railroad*, 155 Mass. 21, 25. *Feeney* v. *York Manuf. Co.* 189 Mass. 336. The question of the plaintiff's due care was rightly left to the jury, and the defendant's sixth and seventh requests having been waived, the first, second, third and fourth were inappropriate for the reasons stated. *Gaynor* v. *Old Colony & Newport Railroad*, 100 Mass. 208, 211, 212. *Prince* v. *Lowell Electric Light Corp.* 201 Mass. 276.

The exceptions of the railroad corporation relate to the rulings and instructions permitting the jury to find, that it could be held liable at common law, and under St. 1906, c. 463, Part I. § 63, with the mills for concurrent negligence or a joint tort. It is participation in the wrong which establishes liability, and not the amount of damages which may be recovered either at common law, or under our statutes authorizing an action for death caused by the wrongful act of the defendant. *Oulighan* v. *Butler*, 189 Mass. 287, 293, 295. *Flynn* v. *Butler*, 189 Mass. 377, 387, 388. The proximate cause of the accident having been the defective car, the plaintiff was entitled to maintain her action against each or all who contributed to the injury and death of her intestate, although she could have but one satisfaction in damages. *Koplan* v. *Boston Gas Light Co.* 177 Mass. 15. *Turner* v. *Page*, 186 Mass. 600. *Doe* v. *Boston & Worcester Street Railway*, 195 Mass. 168. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 175, 581, 582. *Lockwood* v. *Boston Elevated Railway*, 200 Mass. 537, 538.

It is urged, that the mills having used the car in its business, and as a part of its works, the control was changed, and the

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liability of the railroad for defects therefore had ended. *Glynn* v. *Central Railroad*, 175 Mass. 510. *McNamara* v. *Central Vermont Railroad*, 202 Mass. 491, 499. But the defendant owned the car, and did not receive it from a connecting road to be forwarded. The transit apparently began and ended on its own lines. Upon abundant evidence the jury could find, that the arrangement for transportation contemplated, that the cars were to pass from the defendant's track to the private track in the mill yard for the purpose of unloading, and that the defendant authorized the intestate's employer to use the car in question as a means of conveyance. The railroad concedes, that the jury would have been warranted in finding, that the defects were not incapable of discovery, if the inspection by its employees charged with the duty had been thoroughly made. But with full opportunity to ascertain its condition, the defendant selected, loaded and forwarded a car which it knew would be received by the mills, and operated by its employees selected to unload it. It accordingly was bound to furnish and deliver a car which was not defective. *Ladd* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 359. *McNamara* v. *Boston & Maine Railroad*, 202 Mass. 491, 494. It was a question of fact whether, having authorized the use of a dangerous instrumentality, the defendant ought in the exercise of reasonable care to have anticipated the injurious results which might follow, and to have guarded against them. *Boston Woven Hose & Rubber Co.* v. *Kendall*, 178 Mass. 232. *Hale* v. *New York, New Haven, & Hartford Railroad*, 190 Mass. 84. *Conroy* v. *Smith Iron Co.* 194 Mass. 468. *Lebourdais* v. *Vitrified Wheel Co.* 194 Mass. 341, 344. The jury to whom this question was submitted under correct instructions have decided adversely to the defendant, and as matter of law we cannot say that they were wrong.

In each case the exceptions must be overruled.

So ordered.

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MONTGOMERY WARD AND COMPANY *vs.* MARY E. JOHNSON.

Worcester. March 20, 21, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, What constitutes.

A printed circular letter sent by a manufacturer of a certain kind of revolvers to a jobber in the trade, setting forth the terms and conditions upon which orders for the revolvers will be filled, is not an offer that can be accepted by a reply ordering a certain number of the revolvers, but is only an announcement that the manufacturer will receive proposals for sales on the terms and conditions stated, which when received may be accepted or rejected. Accordingly such an order before its acceptance by the manufacturer creates no contract.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 18, 1910, by a corporation engaged in the business of purchasing from manufacturers and selling to consumers all kinds of merchandise on mail orders upon the terms named in its catalogues, against an individual doing business under the name of Iver Johnson's Arms and Cycle Works and manufacturing and selling firearms, revolvers, guns and other articles used by sportsmen, setting forth, as described in the opinion, an alleged contract made by an acceptance by the plaintiff of an alleged offer of the defendant to sell to the plaintiff certain revolvers on certain terms upon which they were ordered by the plaintiff, and praying, first, for a decree for the specific performance of the contract, second, for an injunction restraining the defendant from announcing that she did not deal with mail or catalogue houses, third, for a temporary injunction, and, fourth, for other relief.

The defendant demurred to the bill, assigning, among other causes for demurrer, the ground that the allegations of the bill set forth no contract between the plaintiff and the defendant.

The case was heard by *Hammond*, J., who sustained the demurrer and made a final decree that the bill be dismissed. The plaintiff appealed.

C. F. Choate, Jr., *G. P. Merrick* (of Illinois), & *R. W. Hale*, for the plaintiff.

H. Parker, (*H. H. Fuller* with him,) for the defendant.

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BRALEY, J. The essential allegations of the bill are admitted by the demurrer, but if they fail to show a binding contract between the parties, the bill cannot be maintained for specific performance or injunctive relief. The defendant manufactured and sold firearms of certain types, which had acquired in the market a recognized reputation for their quality and style of workmanship. In the management of the business sales were made only to jobbers, who were to resell to their customers at a uniform price. But, having received complaints that the scale of prices in some instances had not been followed, she issued a printed letter, which after reciting the cause of its publication, and that "we have prepared, and are sending under this cover by registry post a printed document setting forth the terms and conditions upon which Iver Johnson revolvers will be supplied to the jobbing trade," contained the statement, that "hereafter no order will be filled except upon the terms set forth in the enclosed document: therefore, please read it carefully, for we are going to ask your support and co-operation." The plaintiff apparently was a customer of the defendant, and, having received the letter, alleges, that it was "a certain offer in writing to make a contract," the terms and conditions of which were expressed in the accompanying document. It is then alleged, that "intending to accept said contract, and to cause that the defendant should be bound by said acceptance, and that the parties should be mutually bound thereby," the plaintiff transmitted to the defendant an order for revolvers, but there is no allegation that this purpose was communicated to her or that the order was accepted with this understanding. The plaintiff relies on these transactions as constituting a bilateral contract. But, if the letter and document are examined in connection with the recitals, they were not in the nature of a general offer, where upon compliance with the conditions by those to whom it is addressed a legally binding contract at once springs into existence. The defendant promulgated the terms under which she proposed to do business in the future, not with the plaintiff only, but with the members of the jobbing trade, who were to be treated as licensees, as if they would agree to abide by them. It is expressly announced in the seventh paragraph of the document, that the defendant does not undertake to furnish, or to be

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responsible for a failure to deliver goods which may be ordered, and the words, "that it can be revoked, without liability for damages, by thirty days' written notice to date from the actual mailing of the notice," refers to the license to deal in the defendant's product, with a discontinuance of all business relations. "A contract is an agreement which creates an obligation," said Mr. Justice Field in *Ashcroft* v. *Butterworth*, 136 Mass. 511, 514. And an invitation to prospective buyers to negotiate for a license, and to trade with the defendant, even when confined to a definite class, imposes no obligation on the sender of accepting any offer which thereafter might be received. The order of the prospective buyer does not ripen into a contract of sale until the defendant's acceptance, and then only as to goods specifically ordered. *Smith* v. *Gowdy*, 8 Allen, 566. *Lincoln* v. *Erie Preserving Co.* 132 Mass. 129. *Edge Moor Bridge Works* v. *Bristol*, 170 Mass. 528. *Moulton* v. *Kershaw*, 59 Wis. 316. *Spencer* v. *Harding*, L. R. 5 C. P. 561. *Canning* v. *Farquhar*, 16 Q. B. D. 727, 732.

We are of opinion that a fair interpretation of the letter, and document, very plainly shows that it was not a general offer to sell to those addressed, but an announcement, or invitation, that the defendant would receive proposals for sales on the terms and conditions stated, which she might accept or reject at her option. No contract between the parties having been created, the defendant's refusal to accept and fill the plaintiff's orders, as alleged in the bill, was not an actionable wrong, and the further questions of a breach, and the measure and form of relief, and whether the contract was legally terminated by the notice, become immaterial and need not be discussed.

The decree of the single justice sustaining the demurrer and dismissing the bill must be affirmed with costs.

Decree accordingly.

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MOSES WILLIAMS, JR., & another *vs.* MOSES E. BAKER.

Suffolk. March 28, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Tax, Sale, remedy of purchaser. *Covenant. Collector of Taxes.*

The remedy against a city or town given by R. L. c. 18, § 44, to a purchaser at a tax sale, who finds that, by reason of an error, omission or informality in the assessment or the sale, he has no claim to the property purchased, is an exclusive one, of which he can avail himself only by offering in writing to the collector, within two years after the date of his deed, to surrender and discharge his deed or to assign and transfer to the city or town all his right, title and interest in the premises as the collector shall elect; and, where he has not made such an offer within the required time, he cannot maintain an action against the collector on the warranty, inserted in the deed under the requirement of R. L. c. 18, § 43, that the sale in all particulars was conducted according to law.

CONTRACT against the collector of taxes of the town of Dedham upon a covenant of the defendant contained in a deed to the plaintiffs of certain land in Dedham, purchased by them at a tax sale on January 17, 1903, warranting that the sale in all particulars had been conducted according to law. Writ dated June 26, 1908.

In *Williams* v. *Bowers*, 197 Mass. 565, the plaintiffs' title was held to be bad, and in *Williams* v. *Dedham*, 207 Mass. 412, it was decided that the plaintiffs could not recover against the town of Dedham upon the covenant of warranty now sued upon.

In the Superior Court the case was submitted to *Schofield*, J., upon an agreed statement of facts, as follows:

On January 17, 1903, the defendant, as the collector of taxes of the town of Dedham, sold the parcel of land described in the plaintiffs' declaration to the plaintiffs at a tax sale and in pursuance of the sale executed and delivered the deed, a copy of which was annexed to the plaintiffs' declaration.

The consideration paid by the plaintiffs was, as stated in the deed, $54.60, which was the amount of the tax properly assessed upon the property, with interest and the costs of collection.

It was agreed, subject to the objection of the defendant as to its admissibility in evidence, that the value of the land was

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$2,950, and, subject to the objection of the plaintiffs as to its admissibility in evidence, that at the time of the sale the land was subject to a mortgage for $2,500, which was discharged on January 23, 1905, and that there was an alienation of the land in question on January 24, 1905.

The plaintiffs did not within two years after the date of the deed offer by writing given to the collector to surrender and discharge their deed or to assign and transfer to the town all their right, title and interest in the premises, nor did the collector within two years after the date of the deed give notice to the plaintiffs to release any interest which they might have in the land under the deed and to receive from the town the amount paid therefor with interest at ten per cent, or to file with the collector a statement that they refused to release such interest.

The deed of the defendant contained the covenant required by R. L. c. 13, § 43, now St. 1909, c. 490, Part II. § 44, that the sale had in all particulars been conducted according to law. This action was brought upon that covenant.

If the evidence as to the value of the land and as to the amount of the mortgage was admissible, and if the plaintiffs were entitled to recover, it was agreed that the finding should be for $2,950 and interest, or for $450 and interest, or for $54.60 with interest, according to the rule of damages adopted by the court.

The judge ruled that the defendant's covenant of warranty as collector of taxes was a personal covenant, for breach of which he was liable to the grantee; that the measure of damages was not the market value of the land, but was the amount of the consideration paid by the purchaser with interest at a reasonable rate, in view of the nature of the investment, which was of precarious duration owing to the right of redemption; that a reasonable return on it would be eight per cent per annum, following the analogy of the statutes fixing the rate to be paid by owners for redemption, and by cities and towns in case a purchaser takes nothing by his tax deed.

The judge found for the plaintiff and ordered judgment in the sum of $66.40. Each party excepted to the rulings against him. At the request of the defendant, and by consent of both parties, the judge reported the case for determination by this court. If

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the rulings were right, judgment was to be entered as ordered; otherwise, the finding was to be set aside and such judgment was to be entered as law and justice required.

R. D. Swaim, for the plaintiffs.

H. T. Richardson, for the defendant.

BRALEY, J. The defendant as tax collector of the town of Dedham sold certain real estate for non-payment of taxes, which was purchased by the plaintiffs, to whom he gave a deed with a covenant of warranty that the sale in all particulars had been conducted according to law. But, the sale having been declared invalid in *Williams* v. *Bowers*, 197 Mass. 565, because of an insufficient description of the premises in the collector's notice of sale, the plaintiffs sue at common law for breach of the covenant. By the report under which the case is before us the questions for decision are, whether the action is well founded, and whether the damages are limited to the repayment of the consideration money with interest or are measured by the fair market value of the land to which the plaintiffs never acquired title.

We are of opinion that the action cannot be maintained. If before the enactment of St. of 1862, c. 183, § 6, a collector of taxes chose to insert in addition to the statutory requirements of the conveyance, a covenant of seisin or of the right to convey, he might be held personally in damages for a breach. St. 1785, c. 70, § 7. Rev. Sts. c. 8, § 31. St. 1848, c. 166, § 5. Gen. Sts. c. 12, § 35. *Bickford* v. *Page*, 2 Mass. 455. *Sumner* v. *Williams*, 8 Mass. 162, 210. *Lynde* v. *Melrose*, 10 Allen, 49. But, as pointed out in *Williams* v. *Dedham*, 207 Mass. 412, the St. of 1862, c. 183, § 6, made an important change in our laws as to the form of the deed and the rights of a purchaser at an invalid sale. The deed which the collector was required to execute and deliver under Gen. Sts. c. 12, § 35, was thereafter to have "inserted a special warranty that the sale has in all particulars been conducted according to the provisions of law." If subsequently it appeared that by reason of errors or informality in any of the proceedings of assessment or sale, "the purchaser has no claim to the property sold," then, upon his surrender of the deed, the town or city was required to repay to him the amount paid, "which shall be in full satisfaction of all claims for damages for any defect in the proceedings." By re-enactments as amended by the St. of 1878,

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c. 266, § 1, limiting the time in which the right could be exercised to two years from the date of the deed, and providing that at the election of the collector the purchaser should offer in writing either to surrender and discharge the deed "or to assign and transfer to the town or city all his right, title and interest therein," this provision became R. L. c. 13, § 44,* in force when the sale and conveyance in question were made. If the plaintiff's contention is sound, the remedy against the town is merely cumulative, or alternative, and the defendant remains liable on a covenant which the law required him to insert, or the conveyance would have been invalid. R. L. c. 13, §§ 44, 87. A collector of taxes, however, is obliged to accept the office, or subject himself to a fine. R. L. c. 25, § 97. And sales of land for the non-payment of taxes are authorized in the interest and for the benefit of the public. If the Legislature in making the changes intended to impose a personal liability on a public officer by requiring the special covenant, the collector would have been left to perform the duties of his office under the penalty of a liability if the error avoiding the sale arose not through any fault of his own, but from a mistake or some informality of the assessors, which he might not discover before the sale and delivery of the deed, and there would have been no occasion to have gone further, by providing for repayment by the city or town or conferring a right upon the purchaser, which before the statute he did not possess. But, if the legislative purpose is fairly to be gathered from the St. of 1862, c. 183, § 6, that the provision was intended to provide an inexpensive but ample remedy where the land could not be held, R. L. c. 13, § 44, removes all doubt. It is there declared that the payment "shall be in full for all damages," not only "for any defects in the proceedings," but "under the warranty in such deed." The "warranty" is a statutory covenant of the defendant, not of the town, against which the plaintiffs are without recourse, as their remedy under the statute was held in *Williams* v. *Dedham*, 207 Mass. 412, 415, to have been lost by their failure to act within the period of limitation. It, moreover, would be anomalous to construe the statute as intended to give a remedy against the town if in-

* Now St. 1909, c. 490, Part II. § 45.

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voked within two years, while the defendant could be sued at any time within twenty years from the date of the deed. R. L. c. 202, § 1. *Bickford* v. *Page*, 2 Mass. 455. *Clark* v. *Swift*, 3 Met. 390. By the construction adopted, the language of the statute is given its ordinary and obvious meaning. If the purchaser finds within the time prescribed that he cannot hold the land or that there are reasonable grounds to believe that the tax title is fatally defective because of non-compliance with the statutory requirements either preceding or attendant upon the sale, he need not expose himself to vexatious litigation, but can surrender the deed and receive back the purchase price. But, if he neglects seasonably to institute the necessary proceedings, there is no obligation on the part of the city or town or the collector to reimburse him for the loss. The relief provided being fully adequate, it should be held to be exclusive, and, under the reservation in the report, judgment is to be entered for the defendant. *Hodges* v. *Thayer*, 110 Mass. 286. *Staples* v. *Dean*, 114 Mass. 125. *Welch* v. *Boston*, 208 Mass. 326.

So ordered.

BANES STEAMSHIP COMPANY *vs.* AMERICAN IMPORTING AND TRANSPORTATION COMPANY.

Suffolk. March 29, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, Construction, Performance and breach. *Ship. Charter Party.*

In an action upon a charter party for the hire of a steamship for the last month of a term of hiring of seven months, it appeared that the defendant had paid for each of the six previous months and had refused to pay for the seventh month on the ground that the vessel was unseaworthy and that this gave him the right to cancel the charter party. The charter party provided that the steamship should be "tight, staunch, strong and in every way fitted for the service" when delivered to the defendant, and that the plaintiff should "maintain her in a thoroughly efficient state in hull and machinery for and during the services." It also provided that the defendant should not be liable for the vessel's hire during the time required for repairs. It was admitted that the vessel was tight, staunch, strong and in every way fitted for the service when delivered to the defendant. In the month before the last month of the term of the charter party the plaintiff ordered the vessel to sail on a certain day. Her master could not do so because repairs were required.

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The defendant thereupon notified the plaintiff that he surrendered the vessel and demanded a return of the charter. The plaintiff declined to accept the surrender. The judge, before whom the case was tried without a jury, found that the vessel when ordered by the plaintiff to sail at the time in question was unseaworthy, but that this was due to the fact that certain repairs were needed, which were completed in a reasonable time, namely, three days later, and that the vessel then was in a seaworthy condition and continued to be so until the expiration of the term of the charter party. The judge also found that "the plaintiff maintained the . . . vessel in a condition fit for the service for which it was chartered during the whole time of the charter party, except during certain periods when necessary repairs were being made." The findings of the judge were warranted by the evidence. *Held*, that there was no breach by the plaintiff of his agreement nor any failure to perform his part of the contract, and that the defendant had no right to cancel the charter party and in accordance with its terms was liable to pay for the vessel during the last month.

MORTON, J. This is an action to recover for one month's and one day and two hours' hire of the steamship Banes pursuant to a charter party entered into between the owners and the defendant. There is no controversy as to the one day and two hours. The dispute relates to the hire for the month beginning September 17 and ending October 17, 1909. The case was tried before a judge of the Superior Court* without a jury, and was heard partly on agreed facts and partly on oral and written evidence. The judge found for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the presiding judge to give certain rulings that were requested.

The charter party was dated February 27, 1909, and by it the defendant hired the steamship for seven months beginning from the time of delivery between March 15 and 31, and agreed to pay $2,600 per calendar month, in advance monthly from the date of delivery. The vessel was delivered on March 17, and the defendant paid in advance as agreed for the calendar months beginning March 17, April 17, May 17, June 17 and July 17, respectively. On August 16 the defendant sent the plaintiff a check for $2,047.09, being the amount due for the calendar month beginning August 17, less certain deductions for the time when it was alleged the vessel was "off hire" during the month of July. The letter enclosing the check concluded as follows: "From the best information obtainable it is very doubtful whether the S. S. Banes can complete her charter in a reasonably satisfactory

* *Sanderson*, J.

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manner, and we have every reason to fear that she is far from seaworthy." The vessel arrived at Philadelphia on or about August 13, where she was detained several days. The defendant ordered the vessel to sail on August 16, but the captain could not do so because of repairs that were required. On August 19 the plaintiff notified the defendant, through the brokers who had chartered the ship for them, of the detention, adding that they could not "say when [the] ship will be ready for sea." Thereupon the defendant telegraphed, "Hereby surrender Banes being utterly unseaworthy, demand return of charter and coal money." The plaintiff declined to accept the surrender. Some correspondence followed between the parties, and on August 21 the plaintiff notified the defendant that the repairs had been completed and that the captain awaited their orders. Still further correspondence followed, when on August 28 the defendant telegraphed the plaintiff ordering the vessel to sail for Port Maria in Jamaica, to which place the ship sailed, arriving on September 4. On arrival the captain reported to the defendant's agent. The vessel lay there till September 29, when pursuant to the request and by the authority of the defendant, pending efforts at an adjustment, the ship was chartered by the plaintiff to other parties for a trip to Baltimore, and on its arrival at that port lay there without any further orders from the defendant till the expiration of the charter party. The defendant did not pay and never has paid the hire alleged to be due for the calendar month beginning September 17.

The defendant contends that the plaintiff was bound to have the vessel fit for the service it was to perform under the charter party during the whole time covered by the charter party and at each stage of every voyage that it should make in such service. In other words, it contends that there was a warranty of seaworthiness which applied during the whole time covered by the charter party and that inasmuch as the vessel was not in a condition to go to sea when ordered to do so by the defendant on August 16, the warranty was broken and the defendant had a right to cancel the charter party.

It may well be doubted whether the attempted cancellation was not waived by ordering the vessel to sail on August 28, and by the subsequent authority given to the plaintiff to charter her

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to another party for a trip to Baltimore. But, however that may be, the agreement of the plaintiff was not that the vessel should be seaworthy at all times during the period covered by the charter party, but that she should be "tight, staunch, strong and in every way fitted for the service" when delivered to the defendant in Baltimore, and that the plaintiff should "maintain her in a thoroughly efficient state in hull and machinery for and during the services;" and the charter party expressly contemplated that the vessel might have to be withdrawn at times for repairs, and provided that the defendant should not be liable for the vessel's hire during the time required for repairs. The judge found that the vessel was unseaworthy when ordered by the defendant to sail on August 16, but that that was due to the fact that certain repairs were needed which were completed in a reasonable time, namely, by August 19, and that the vessel was then in a seaworthy condition and continued to be so until the expiration of the charter party. The judge also found that "the plaintiff maintained the . . . vessel in a condition fit for the service for which it was chartered during the whole time of the charter party, excepting during certain periods when necessary repairs were being made." It follows from these findings, which were warranted by the evidence, that there was no breach of its agreement by the plaintiff, or failure to perform its part of the contract, and that the defendant had no right to cancel the charter party as it attempted to do. It also follows that the defendant has no claim against the plaintiff for damages * for an alleged breach of contract by it.

The plaintiff did not warrant that the vessel should at all times be seaworthy and fit for the service she was to perform. It covenanted that she should be tight, staunch, strong and in every way fitted for the service when delivered to the defendant, and agreed that it would maintain her in a thoroughly efficient state in hull and machinery. It is not contended that she was not tight, staunch, strong and in every way fitted for the service when delivered, and the agreement to "maintain her in a thoroughly efficient state" "was well kept and fully performed, if every de-

* There was an amendment to the answer, called a declaration in set-off, claiming damages in recoupment.

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fect and want of suitable repair were remedied as soon as by the use of due and reasonable diligence they could be discovered and proper opportunity could be had to repair the vessel and make her seaworthy." *Cook* v. *Gowan*, 15 Gray, 237, 239. *The Francis Wright*, 105 U. S. 381, 392. The defendant was compensated for any delay, if not unreasonable, to which it might be subjected, by the provision in the contract that it should not be held liable for the hire of the vessel during the time required for repairs. *The Francis Wright*, *supra*, p. 392. There is nothing in the contention that the chartering of the vessel by the plaintiff to other parties for the trip to Baltimore relieved the defendant from liability. It was done with the consent and approval of the defendant.

Exceptions overruled.

W. B. Oroutt, for the defendant, submitted a brief.

F. H. Smith, Jr., (*D. M. Hill* with him,) for the plaintiff.

M. FRANCES BERRY, administratrix, *vs.* NEWTON AND BOSTON STREET RAILWAY COMPANY.

SAME *vs.* SAME.

Norfolk. March 30, 1911. — May 18, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, In use of highway, Gross, Due care of plaintiff. *Street Railway.*

If an electric street car, which is behind time, is run on a single track through the main thoroughfare of a village at a speed of about twenty-five miles an hour without sounding a gong or giving any warning of its approach, and in crossing an intersecting street runs down a traveller crossing the main street on foot, throws him a distance of ten feet from the car with such force that he rolls ten feet farther, and then continues on its way without stopping, this is evidence of gross negligence toward the traveller on the part of the motorman and the conductor of the car.

A traveller on foot, who is about to cross the main thoroughfare of a village, on which, three feet from the sidewalk, is the single track of a street railway where electric cars run at stated intervals with which he is familiar, is not necessarily negligent in starting to cross the street without looking for a car which he reasonably may suppose already to have passed, but which, being behind time, is approaching at great speed and runs him down.

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If a traveller on foot, who, coming from an intersecting street, is about to cross the main thoroughfare of a village, on which, three feet from the sidewalk, is the single track of a street railway where electric cars run at stated intervals with which he is familiar, knowing that no car then is due from the right, looks to the right and sees no car, and, when approaching the track, is accosted by an acquaintance, to whom he waves his hand, and then passes forward behind a large tree in the sidewalk, which cuts off his view of the track on the right until he is within a step of the first rail, and, pausing for a relatively short space of time, he then goes on the track and is run down and killed by a car, which is behind time and is approaching from the right at great speed and without warning, the administrator of his estate is not necessarily precluded from recovering for the death of his intestate thus caused, the question of the due care of the intestate being for the jury.

BRALEY, J. The plaintiff sues in the first action to recover damages at common law for the conscious suffering, and in the second action under R. L. c. 111, § 267, now St. 1906, c. 463, Part I. § 63, as amended by St. 1907, c. 392, c. 428, § 4, for the death of her intestate. But no evidence was introduced at the trial, as the judge * on the opening for the plaintiff ordered verdicts to be returned for the defendant.

If the proof might have failed to support the actions, our decision must go upon the ground that the plaintiff's evidence would have corresponded with the statements on which the right of recovery was rested. The questions for decision, therefore, are, whether, taking the opening to be true, the jury would have been warranted in finding that at the time of the accident the defendant was negligent or that its servants were guilty of gross negligence, and that the intestate was in the exercise of due care.

The car, which was behind time, was being run through the main thoroughfare of the village † at a speed of some twenty-five miles an hour, or twice the speed of an ordinary car, without sounding the gong or giving any warning of its approach. It had attained such momentum at the intersecting street, where the intestate was struck, that he was thrown a distance of ten feet from the car, and then by force of the impact rolled some ten feet farther, while the car did not stop after the collision, but continued on its way. To operate a street railway car in

* *Wait, J.*

† The village was in that part of Needham called Highlandville or Needham Heights, the main thoroughfare was Highland Avenue and the intersecting street from which the plaintiff's intestate came was West Street.

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this manner, and under the conditions described, was evidence of gross negligence under the statute of its motorman and conductor. *Hatch* v. *Boston & Northern Street Railway*, 205 Mass. 410, 413. *Horsman* v. *Brockton & Plymouth Street Railway*, 205 Mass. 519, 521. *Galbraith* v. *West End Street Railway*, 165 Mass. 572, 580, 581. *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77. *Spooner* v. *Old Colony Street Railway*, 190 Mass. 132. *McNamara* v. *Boston & Maine Railroad*, 202 Mass. 491.

The defendant, however, urgently insists that there were no affirmative statements, which, if proved, are sufficient to warrant an inference that the intestate was ordinarily prudent, and that his conduct at the time of the injury rests on the merest conjecture. A few moments before the collision he left his place of business, and passing along the intersecting street in the direction of his home, it became necessary for him to cross the street railway, consisting of a single track located about three feet from the edge of the sidewalk of the street through which it ran. To his right, from which direction the car came, were trees more or less intercepting the view especially if a car was approaching at high speed, while the tree nearest to him in the sidewalk over which he was going was of such size and so close as to preclude any actual observation in that direction until passed, when a step would bring him to the track rail. While proceeding on his way, and when in close proximity to the track, he was accosted by an acquaintance to whom he waved his hand, and then went forward, passing behind the tree, "paused for a relatively short space of time and then went on to the track." The exceptions recite, "that just before that, when he was addressed, he looked in the direction from which the car came," and "that this car was not due to go by there . . . at that time, and except for a warning, or seeing a car, he had no reason to expect there would be a car there at the time he crossed," and that "at the time he reached the crossing the next car due there" was a car coming from the opposite direction. It further appears, as we have said, that the car being late was running outside of the schedule time, and "it passed some minutes after the time when it was supposed to pass and was known to be due." It was stated, that the running time of the cars, the location of the track, the usual

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rate of speed, and the general conditions of public travel at the place were well known by him, and the inference would have been justified, that as he came to the track he supposed that the car had passed. The general rule whether a plaintiff has shown that he used due care, ordinarily said Mr. Justice Colt in *Gaynor* v. *Old Colony & Newport Railway*, 100 Mass. 208, 212, "is to be settled as a question of fact, in each case as it arises, upon a consideration of all the circumstances disclosed, in connection with the ordinary conduct and motives of men, applying as the measure of ordinary care the rule that it must be such care as men of common prudence usually exercise in positions of like exposure and danger. When the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact, to be determined by the jury under proper instructions. It is the judgment and experience of the jury, and not of the judge, which is to be appealed to." The rule governing the conduct of travellers at railroad crossings has no application when they are using a public way through which street cars are running at stated intervals. *Robbins* v. *Springfield Street Railway*, 165 Mass. 30, 36. *Hennessey* v. *Taylor*, 189 Mass. 583, 586. *Finnick* v. *Boston & Northern Street Railway*, 190 Mass. 382, 386. *Beale* v. *Old Colony Street Railway*, 196 Mass. 119. *Murphy* v. *Boston Elevated Railway*, 204 Mass. 229. *O'Brien* v. *Lexington & Boston Street Railway*, 205 Mass. 182, 184. *Rogers* v. *Phillips*, 206 Mass. 308. *Doherty* v. *Boston & Northern Street Railway*, 207 Mass. 27, 29. And it would be an extreme position to take, that a pedestrian was bound at his peril to take precautions to avoid or look for a street car, where, according to the time schedule with which he was familiar, he might reasonably believe that it had passed, and that, if he failed to look before stepping to the track and was injured, he should be precluded from recovery. The cases of *Howland* v. *Union Street Railway*, 150 Mass. 86, 88, and *Finnick* v. *Boston & Northern Street Railway*, 190 Mass. 382, decided, that failure to take this precaution under conditions very closely analogous was not a bar as matter of law. See also *O'Brien* v. *Lexington*

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& Boston Street Railway, 205 Mass. 182, 184, 185, and cases cited. It also appears, that almost up to the very moment of collision the movements of the intestate were observed, and from his conduct the jury with "their knowledge of the habits of thought and mind and the natural instincts of men" could find that he was using the street in the ordinarily careful way, and continued to exercise the same degree of caution and observation in passing over the intervening space to the point where he was unexpectedly struck. *Hinckley* v. *Cape Cod Railroad*, 120 Mass. 257, 265. *Horsman* v. *Brockton & Plymouth Street Railway*, 205 Mass. 519, 522. In *Prince* v. *Lowell Electric Light Corp.* 201 Mass. 276, the intestate was killed from a shock of electricity caused by the defendant's negligence in permitting a broken wire charged with the current to be suspended in the street where the deceased was passing, and with which he came in contact, but there was no positive evidence of his movements immediately preceding his death. It was held, however, following *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379, 382, that "it is not necessary that any positive act of care shall be proved. It may be inferred from the absence of fault, when sufficient circumstances are shown fairly to exclude the idea of negligence on his part." It cannot conclusively be presumed that with no thought for his safety the plaintiff's intestate heedlessly and voluntarily permitted himself to be placed in jeopardy. *Robbins* v. *Dartmouth & Westport Street Railway*, 203 Mass. 546, 548.

If as he was about to step forward he again had looked, it may be that the unanticipated car, even if moving at an unusual and excessive speed, might not have been so closely upon him, but that he could have drawn back and avoided being injured. But, whether under all the circumstances he ought to have done so, should have been left to the jury to decide.

Exceptions sustained.

J. W. Allen, (*H. W. Packer* with him,) for the plaintiff.

P. F. Drew, for the defendant.

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WORCESTER COLOR COMPANY v. HENRY WOOD'S SONS COMPANY.

Norfolk. November 18, 1910. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Accord and Satisfaction. Payment. Corporation, Dissolution. *Words*, "In full to date," "Suit," "Pending."

The proposition, that the acceptance and collection of a check, proffered upon the condition that it is in full settlement of an unliquidated claim, even though accompanied by protestations that it is not so received, bars any attempt to collect the balance, is supported by the great weight of authority. Remark of RUGG, J.

The use of the words "in full to date" or an equivalent phrase in connection with the payment of a controverted claim does not necessarily create an accord and satisfaction, and often, although these words have been used, it is a question of fact whether the acceptance of the payment constituted an accord and satisfaction.

In an action for the price of certain goods the defendant admitted that the goods had been sold and delivered to him by the plaintiff but alleged that there had been an accord and satisfaction. It appeared that, about a week after the goods were sold and delivered, a contract in writing was made by the parties for the sale of other articles, and that later the payments called for by the contract in writing were made in full. The defendant, when asked to pay for the goods in question, asserted that they had been included in the contract in writing. This was denied by the plaintiff. In the month following the making of the contract in writing the plaintiff shipped to the defendant a consignment of pulp blue, which the defendant had ordered in a separate transaction. There was a dispute between the parties as to the quantity and the quality of the pulp blue and as to the price to be paid for it. After correspondence, the plaintiff sent to the defendant a corrected bill for the pulp blue, stating as the amount due a sum considerably less than that originally claimed. The defendant thereupon returned the corrected bill in a letter, saying, "Enclosed please find check for your account in full," naming the amount of the corrected bill for the pulp blue. Enclosed was a check for that amount on which was written "in full to date." The plaintiff, after consultation with his attorney, drew a pen through the words "in full to date," collected the check in ordinary course and sent the receipted bill to the defendant with a letter, in which he said that the check was in settlement of the invoice of the pulp blue and was not in full for all claims, and asked the defendant to remit the price of the goods now sued for. It was plain as matter of law that the contract in writing between the parties did not include the items in dispute as the defendant wrongly had supposed and asserted. *Held*, that the letter of the defendant, in which the check was transmitted, and the words written upon the check, in the light of all the transactions between the parties, were not so plain and unequivocal as to warrant a ruling of law that they meant an offer of the check upon the condition that, if ac-

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cepted, it would be in full settlement of all disputed claims, that the burden of proving the defense of an accord and satisfaction was on the defendant, and that the question whether he had sustained that burden was one of fact for the jury.

In St. 1907, c. 290, dissolving by § 1 a large number of corporations there enumerated, subject to the provisions of St. 1903, c. 437, §§ 52, 53, and providing in § 2 that "nothing in this act shall be construed to affect any suit now pending by or against any corporation mentioned in the first section of this act," the word "suit" includes an action at law, and the word "pending" includes an action in which the writ is dated four days before the statute took effect, although it was not served on the defendant until five days after the statute took effect.

RUGG, J. This is an action of contract to recover the price for two bills of merchandise.* There is no controversy between the parties that the goods were sold and delivered and that the prices charged were fair. The only defense is that there has been an accord and satisfaction.

The course of dealings between the parties was this: On March 19, 1906, the defendant ordered of the plaintiff six barrels of Milori blue, and on March 21, 1906, two hundred and twenty-six pounds of Chinese blue, which were shipped on these days respectively. On March 28, 1906, a written contract was made by which certain machinery and other chattels were sold by the plaintiff to the defendant for $5,000 to be paid in instalments. On the same date but by a separate transaction the defendant agreed to buy of the plaintiff a lot of pulp blue. The pulp blue was invoiced and shipped on April 16, 1906, in three different items the prices charged aggregating $532.07. Thereafter the defendant asserted that the shipments of March 19 and 21 were included in the contract of March 28, and that the $5,000 therein stipulated was to pay for the earlier sales. It further asserted that the pulp blue was larger in quantity and poorer in quality than had been represented, while the plaintiff asserted that it corresponded with the representation both as to quality and quantity. There were communications between representatives of the plaintiff and the defendant touching these matters. Ultimately the defendant paid the $5,000 called for by the written contract of March 28, 1906, but did not pay for the invoiced goods. On December 24, 1906,

* The two items were as follows:

"Mar. 19, 1906, 6 bbls. 1019 lbs. light milori blue at	$ .25	$254.75
"Mar. 21, 1906, 226 lbs. no. 35 Chinese blue at	.25	56.50"

The writ was dated April 9, 1907, and was served on the defendant on April 18, 1907. The declaration was filed on April 27, 1907.

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the plaintiff sent the defendant a corrected bill for the pulp blue, reducing it by $210.76, and making the total $321.31, together with a letter explaining that the reduction was made in accordance with a letter of May 1, 1906, from the plaintiff to the defendant, in which it was stated that the reduction in price was made "with the understanding that all other payments for material will be paid for according to invoices and contract." On January 11, 1907, the plaintiff wrote to the defendant again asking for a remittance. The defendant made no reply to either of these communications until March 13, 1907, when it returned the corrected bill for the pulp blue invoice of April 16, 1906, showing the amount due to be $321.31 together with a check for that sum, on which was written "in full to date" and a letter saying "Enclosed please find check for your account in full $321.31." The letter did not refer specifically to the invoices of March 19 and 21, 1906. Thereupon the president of the plaintiff after consultation with his attorney drew a pen through the words upon the check, "in full to date," collected it in ordinary course and sent the receipted bill to the defendant with a letter in which he said that the check was in settlement of the April 16, 1906, invoice and was not in full for all claims and asking remittance for the items here in litigation.*

In this posture of the evidence, the presiding judge † instructed the jury as matter of law that the sales of March 19 and 21, 1906, being the subject of this action, were not included in the written agreement of sale of March 28, 1906. This was plainly right, and it is not now contended otherwise by the defendant. He

* This letter of the plaintiff's president was dated March 18, 1907. The whole of the letter, omitting the address and the signature, was as follows: "Referring to your favor of the 13th, reply to which has been delayed on account of writer's absence, we acknowledge receipt of your check for $321.31 in settlement April 16th, 1906, invoice. It does not settle the account in full, however, as your letter reads, and we ask that you send us check for the balance of account. There is no reason under the sun why you should not pay March 21st invoice of $56.50, goods shipped to International Carbon Paper Co. for you probably received your money a long time ago. Invoice of March 19, 1906, is also due, and has got to be paid. It has absolutely nothing to do with contract as we have explained a number of times. Please let us hear from you at once, as the matter has dragged as long as we think it ought to."

† *Lawton*, J.

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further ruled in substance that the defendant was honest in its contention that the goods here sued for were included in the written contract of March 28. Unless this was assented to by both parties, it was too favorable to the defendant, for whether the dispute was genuine or not, especially in view of the correct ruling of law that they were not so included, was a question of fact, which was for the jury unless by agreement there was no issue about it. He also left it to the jury to say whether there had been an accord and satisfaction. He ruled that it was a question of fact to be decided upon the testimony, correspondence, and all the circumstances, whether the defendant at the time the check was sent and the plaintiff at the time it was received and deposited understood or ought to have understood as reasonable men that it was an accord and satisfaction of all outstanding claims between them, and that if the defendant made known to the plaintiff that the payment was on the condition that it should be received in full satisfaction of both its claims against the defendant, or if the plaintiff ought reasonably to have understood that this check was sent to be used only upon that condition, the plaintiff, having accepted it, could not recover. The language of the letter of the defendant which transmitted the check and the words written upon the check in the light of all the transactions between the parties were not so plain and unequivocal as to warrant a ruling of law that any rational person ought to have understood that they meant an offer of the check upon the condition that if accepted it would be in full settlement of all disputed claims. There had been two subjects of controversy between the parties: one was whether the invoices of March 19 and 21 were included in the written contract of March 28 for an entire price. About this the parties were wholly at variance, and there had been no suggestion of compromise, each having endeavored by correspondence to convince the other of its error. This disagreement was about the construction of the terms of a written contract and was a question of law. The other controversy related to the price which should be charged for some pulp blue. This controversy did not relate to liability, for the defendant admitted its liability, but to the amount for which it was liable and was wholly a question of fact. The defendant asserted its readiness to pay this account when a

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corrected bill was sent to it. After such a bill had been sent, the defendant returned it to the plaintiff with the check which was for the precise amount of this bill, together with the letter, which did not refer in terms to any other matter than the bill. There is much to be said in support of the contention that the fair inference from the use of the words "for your account in full" in the defendant's letter and "in full to date" on the check, read in the light of the previous relations of the parties, and of the fact that statement for the pulp blue alone was enclosed, referred only to the pulp blue account. It was at least susceptible of this construction. But it is strongly urged that the action of the president of the plaintiff and his letter acknowledging the check show clearly that he understood it to be tendered by the defendant upon condition that it was in full satisfaction of all outstanding claims, and that by acceptance and collection of it the plaintiff became bound to the condition upon which it was offered. The proposition that the acceptance and collection of a check, proffered upon the condition that it is in full settlement of an unliquidated claim, even though accompanied by protestations that it is not so received, bars any attempt to collect the balance, is supported by the great weight of authority. (See *Seeds Grain & Hay Co.* v. *Conger*, 83 Ohio St. 169, and cases collected in 1 Encyc. L. & P. 629, *et seq.* But see also 17 Harv. Law Rev. 459–469, and *Day* v. *McLea*, 22 Q. B. D. 610.) The letter and testimony of the plaintiff's manager does not go so far as to amount to an admission as matter of law that he came within this principle. It may be assumed that his erasure of the words "in full to date" from the check was unauthorized and did not affect the rights of the defendant. *Hull* v. *Johnson & Co.* 22 R. I. 66. *Gribble* v. *Raymond Van Praag Supply Co.* 124 App. Div. (N. Y.) 829. *Hussey* v. *Crass*, 58 S. W. Rep. 986. His words and actions are capable of the construction that he understood that the check was in full only of the theretofore disputed pulp blue account, inasmuch as it was for the exact amount of the bill for those goods with which alone it was enclosed, and that he was cautiously guarding against any possible misconstruction which might be attached to the situation later. It is not every use of the words "in full to date" or equivalent phrase which constitutes an accord and satisfaction

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in connection with the payment of a controverted claim. Many cases have arisen where the conditions have been such as make it a question of fact whether there has been an accord and satisfaction, even though these words have been used where a payment has been made. This case falls within that class.*

It is rarely that a presiding judge can rule as matter of law that a burden of proof, depending upon inferences from circumstances and oral testimony, has been sustained. Usually a question of fact is presented. Here the defendant was bound to make out its defense of accord and satisfaction, and it cannot be said that the jury had no right to find that the president of the plaintiff, when he received the defendant's check and letter, understood that it was sent for the pulp blue bill, which accompanied it and which was much smaller than at first claimed. In the opinion of a majority of the court the defendant's requests for instructions,† so far as not given in substance, were rightly refused, and the charge was sufficiently favorable to it upon this branch of the case.

After the verdict, ‡ which was returned on January 18, 1910, and after the filing of the bill of exceptions but before it was allowed, the defendant filed a motion to dismiss the action on the ground that the plaintiff corporation was dissolved by St. 1907, c. 290, which took effect on April 13, 1907. Section 2 of this act provided that "nothing in this act shall be construed to affect any suit now pending by or against any corporation mentioned in the first section of this act." Suit is used in this statute as a comprehensive word "To apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords" and includes an action at law. *Weston* v. *City Council of Charleston*, 2 Pet. 449, 464. *Kohl* v. *United States*, 91 U. S. 367, 375. See *Boston* v.

* *Laroe* v. *Sugar Loaf Dairy Co.* 180 N. Y. 367. *Eames Vacuum Brake Co.* v. *Prosser*, 157 N. Y. 289, 299. *Krauser* v. *McCurdy*, 174 Penn. St. 174. *Mortlock* v. *Williams*, 76 Mich. 568. *Rosenfield* v. *Fortier*, 94 Mich. 29, 34. *Louisville, New Albany & Chicago Railway* v. *Helm*, 22 Ky. Law Rep. 964. *Rapp* v. *Giddings*, 4 So. Dak. 492. *McKay* v. *Myers*, 166 Mass. 312. *Nathan* v. *Ogdens*, 93 L. T. (N. S.) 553; *S. C.* 94 L. T. (N. S.) 126.

† These were in substance that the plaintiff's acceptance and collection of the check constituted an accord and satisfaction.

‡ For the plaintiff in the sum of $359.98.

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Turner, 201 Mass. 190, 196. This writ was dated on April 9, 1907, and this action was therefore commenced before the statute went into effect. It was pending within the meaning of that word in § 2. Although in some connections "pending" is not properly descriptive of an action until it is entered in court (*Commonwealth* v. *Churchill*, 5 Mass. 174, 180; *Federhen* v. *Smith*, 3 Allen, 119), commonly an action is pending from the date of the writ. The effect of the language quoted from § 2 was to keep alive any suit then pending, notwithstanding the reference in § 1 to St. 1903, c. 437, §§ 52, 53, which continues the corporate existence of dissolved corporations for three years only (*inter alia*) for the purpose of prosecuting and defending suits. Hence *Thornton* v. *Marginal Freight Railway*, 123 Mass. 32, does not govern. *Pomeroy* v. *Bank of Indiana*, 1 Wall. 23. *Taylor* v. *Bowker*, 111 U. S. 110, 116.

Exceptions overruled.

The case was argued at the bar in November, 1910, before *Knowlton*, C. J., *Morton*, *Loring*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

H. S. Davis, for the defendant.

P. M. Lewis, for the plaintiff.

DENNIS E. CONNERS *vs.* CITY OF LOWELL.
JOSEPH WALSH *vs.* SAME.
EDWARD F. CONNERS *vs.* SAME.

Middlesex. January 11, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., LORING, BRALEY, SHELDON, & RUGG, JJ.

Tax, Sale, Deed, Assessment. *Deed. Notice. Name.*

A tax deed of real estate, when not in the language of St. 1909, c. 490, Part II. § 89, number 14, in order to be valid as a suitable instrument of conveyance, must set out either in precise phrase or by fair intendment to a reasonable certainty a statement of performance of all those acts which are essential to a legal cause for selling the real estate at the time when the sale took place.

In a tax deed bearing the superscription, "Commonwealth of Massachusetts," and signed by one entitling himself "Collector of Taxes for the City of Lowell" a description of the newspaper in which the notice of the tax sale was published as the "Lowell Sun," or the "Lowell Daily Telegram," without any further assertion as to the place of publication than that it was "in the county where

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said real estate lies," does not make the deed invalid, although there is no express statement in the deed of the city or town within which the real estate lies, because the city where the newspaper was published is sufficiently indicated.

A tax deed, bearing the superscription, "Commonwealth of Massachusetts," and signed by one entitling himself "Collector of Taxes for" a certain city, is invalid if the newspaper in which the notice of sale was published is described as "L'Etoile," without any further assertion as to the place of publication than that it was "in the county where said real estate lies," the deed not expressly stating where the real estate lies.

The omission in a tax deed, signed by the collector of taxes of Lowell, and containing a statement that the notice of sale was posted "in city hall, a public place in said Lowell," of a further statement that the city hall was, as is required by St. 1909, c. 490, Part II. § 41, a "convenient" place for such publication, does not invalidate the deed.

A tax deed, which omits to state that the advertisement of the sale contained, as required by St. 1909, c. 490, Part II. § 39, "the names of all owners known to the collector," is invalid.

A tax deed dated July 21, 1908, is not rendered invalid because in the narration contained therein of the terms stated in the advertisement of the tax sale it was stated that the sale would be for "non-payment" of taxes, instead of for their "discharge and payment," which are the words used in R. L. c. 18, § 87, form numbered 14.

A tax deed dated July 21, 1908, which contains a statement that the advertisement of the tax sale was for the sale of "the smallest undivided part of said estate" sufficient to discharge the lien, and that the sale was of the whole and not of any undivided part, is invalid because it is defective in the statement of a cause for the sale of the whole of the land.

The name of a person is the distinctive characterization in words by which he is known and distinguished from others. By RUGG, J.

Certain land in a city properly was assessed in a certain year to the "heirs of W." The records of the Probate Court where the land was situated showed at the time of the assessment what the names of the "heirs of W" were. Subsequently the land was sold for non-payment of the tax and in the tax deed the collector of taxes stated that demand for the tax was made upon "the heirs of W," without stating their names. *Held*, that in ascertaining the name of the owners of the land, which by the statute must be stated in the advertisement for the sale, the collector was chargeable with knowledge of what might have been found upon the probate records, and therefore that the omission of such names from the deed in question rendered it invalid.

A publication of the advertisement of a tax sale required by St. 1909, c. 490, Part II. § 39, in the English language in a newspaper not printed in that language, renders the sale invalid.

A general public notice required by law in this Commonwealth to be published in a newspaper must be printed in the English language and in a newspaper printed in that language.

If a certain lot of land, which was sold at a tax sale and is not of the character described in St. 1909, c. 490, Part II. § 50, is described in the deed of the tax collector as being the whole or a part of a lot of a certain number, with the name of the street and the side of the street upon which it is located and the names of all abutting owners with the general points of compass on which the land of the abutting owners lies, but without further designation by metes and bounds and without reference to any plan upon which the lot as numbered may be found, the description is sufficient.

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While the description of certain land in an advertisement of a sale of the land for nonpayment of taxes must be such as to enable both owner and bidder to locate the land with substantial certainty, it need not be so detailed as to point out visually the precise boundaries of the land so that an utter stranger, unacquainted with the locality and ignorant of the neighbors, could find it without inquiry.

A sale of land in a city for the collection of a tax assessed to a person not in possession but holding a deed thereof which is valid on its face and which was given by the collector of taxes after a sale of the land for the collection of a tax assessed in a previous year, is not invalid by reason of the fact that the holder of the first tax deed failed by inadvertence to file in the registry of deeds or with the treasurer of the city where the land was situated the statement of his residence and place of business required by R. L. c. 13, § 45, now St. 1909, c. 490, Part II. § 46.

If a certain lot of land in a city which was sold at a tax sale and is not of the character described in St. 1909, c. 490, Part II. § 50, is described in the deed of the tax collector only by its area in square feet, more or less, the street and the side thereof on which it is located and a certain lot number without reference to any plan, such description is insufficient and the deed is invalid on its face, although there is a private plan on record at the registry of deeds of the county in which the land is situated and at the office of the city engineer, on which the lot could be sufficiently identified.

The holder of a tax deed of land which is invalid on its face is not the person "appearing of record" as owner, to whom an assessment of a tax on the land should be assessed.

If a tax on certain land is assessed to the holder of a tax deed thereof which is invalid on its face, such assessment is invalid, and a sale of the land for the collection of a tax so assessed is void.

THREE ACTIONS OF CONTRACT under the provisions of St. 1909, c. 490, Part II. § 45, to recover money paid to the collector of the defendant by the respective plaintiffs for certain property sold to them at tax sales, and conveyed to them by collector's deeds, the plaintiffs contending that for various reasons the sales and the deeds were invalid. Writs dated June 15, 1910.

The plaintiff in the first case sought to recover twenty-one different sums which he had paid at a collector's sale on August 10, 1909, for twenty-one different parcels of land then sold to him. The items were described in a bill of particulars under numbers 1 to 6 inclusive, 8, 9, 11, 12, 14 to 23 inclusive, and 27.

The plaintiff in the second case sought to recover five different sums described in a bill of particulars in five items, which he had paid at a collector's sale on July 21, 1908, for five different parcels of land then sold to him.

The plaintiff in the third case sought to recover eight different sums, of which four were sums that he had paid at the collector's sale on July 21, 1908, and four were sums that he

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had paid at the collector's sale on August 10, 1909, for different parcels of property sold to him by the collector. The items as to the July 21, 1908, sale were described in a bill of particulars and were numbered 1, 3 to 5 inclusive. The items as to the August 10, 1909, sale were numbered 6, 7, 9, 10.

In the Superior Court the cases were submitted together to *Harris*, J., upon an agreed statement of facts.

It appeared that the form of deed described in the first numbered paragraph of the opinion and its subdivisions was that used by the collector in conveying all of the property sold to the plaintiffs Walsh and Edward F. Conners at the sale on July 21, 1908, comprising the transactions described in all the items of the second action and in the items numbered 1, 3 to 5 inclusive in the third action. The same form was used by the collector in conveying, after a previous tax sale, the land described in items 6, 7, 9 and 10 in the third action to the person to whom the subsequent assessments, which were the foundation of the sales described in those items, were made. All such deeds were signed, "Andrew G. Stiles, Collector of Taxes for the City of Lowell."

The form of description of the persons upon whom the collector made demands, described in the second numbered paragraph of the opinion, was used in the deeds described in items numbered 6, 16 and 17 in the first action.

The publication of the notice of sale in a newspaper printed in the French language, as stated in the third numbered paragraph of the opinion, occurred as to the sale described in item numbered 1 of the third action, and in items numbered 8, 9, 11, 12, 14 to 21, inclusive, and 23 of the first action.

The descriptions of the land sold, discussed in the fourth and fifth numbered paragraphs of the opinion, were those used to designate the land referred to in items numbered 6, 7, 9 and 10 in the third case, and items numbered 1 to 3 inclusive, 5, 6, 8, 9, 11, 12, 14 to 22 inclusive and 27 in the first case.

The assessment of land to a person not in possession but holding a tax collector's deed, valid on its face and duly recorded, who had failed to file the statement of his residence and place of business required by R. L. c. 13, § 45, referred to in the sixth numbered paragraph of the opinion, was the foundation of the sale described in items numbered 6 and 10 in the third case.

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The deeds referred to in the paragraph of the opinion numbered seven were those described in items numbered 6, 7, 9 and 10 in the third action.

The judge found for the plaintiff in the first action as to items 6, 8, 9, 11, 12, 14 to 21 inclusive and 23, and for the defendant on the other items in that case, and judgment was entered accordingly. Both parties appealed.

The finding and judgment in the second case was for the plaintiff as to all the items. The defendant appealed.

In the third case the judge found for the plaintiff as to items 1, 3, to 5, inclusive, and for the defendant as to the other items, and judgment was entered accordingly. Both parties appealed.

Other facts are stated in the opinion.

The cases were submitted on briefs.

A. S. Howard, for the plaintiffs.

W. W. Duncan, for the defendant.

RUGG, J. These are actions under St. 1909, c. 490, Part II. § 45, (formerly R. L. c. 13, § 44,) to recover money paid for tax deeds which, it is claimed, by reason of error, omissions or informality in the sales, conveyed no title.

1. The form of tax deed used in several sales was that prescribed in St. 1901, c. 519. This form was in the law less than six months, having been repealed by R. L. c. 227, and supplanted by No. 14 of Schedule of Forms attached to R. L. c. 13, § 87, now St. 1909, c. 490, Part II. § 89, No. 14. The question is whether this form employed since 1902, was "suitable" under R. L. c. 13, § 87, (now St. 1909, c. 490, Part II. § 89.) The fact that the Legislature permitted its use for a brief period, and then in substance restored important recitals which had existed in earlier statutes, does not necessarily make it a suitable form for any other time than that during which it was expressly authorized. The requirements of law as to a tax sale were the same both before and after 1901.

A tax deed in order to be valid as a suitable instrument of conveyance, when not in the language of the statute, must set out either in precise phrase or by fair intendment to a reasonable certainty a statement of performance of all these acts which are essential to the existence of a legal cause for selling at the time when the sale was made. Although the terms of a tax deed

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need not show actual compliance to a technical nicety with the minute particulars of statutory requirements in making the sale itself, yet they must satisfy a reasonable mind without resort to extrinsic evidence that a valid cause of sale in fact existed. The collector of taxes has a naked power to sell real estate to pay the lien for taxes, and he must not only strictly conform to all the conditions precedent to the exercise of his power, but his deed must contain also all the recitals of substance which the statute imposes, both for the information of the purchaser and of the owner and of those claiming under each. *Charland* v. *Home for Aged Women*, 204 Mass. 563, and cases cited. *Harrington* v. *Worcester*, 6 Allen, 576. *Langdon* v. *Stewart*, 142 Mass. 576. Adherence to the somewhat strict rules which have been established as to tax deeds assumes a new importance in view of the sweeping provision of St. 1911, c. 370, to the effect that when duly recorded such a deed "shall be *prima facie* evidence of all acts essential to its validity." (Compare St. 1901, c. 197; R. L. c. 13, § 45; St. 1902, c. 423.) Several objections are made to the deeds based on their variation from said form No. 14.

(a) The newspapers in which the notices of sale were printed were described by name as the "Lowell Sun," "Lowell Daily Telegram," and "L'Etoile" without any further assertion as to the place of publication than that it was "in the county where said real estate lies." Although there is no statement in the deed of the city or town within which the real estate lies, it may fairly be inferred from the circumstance that the deed was headed "Commonwealth of Massachusetts," that the "Lowell Sun" and the "Lowell Daily Telegram" were published in Lowell in this Commonwealth. Newspapers sometimes bear as a part of their title the name of a small country town, although not published there, (*Rose* v. *Fall River Five Cents Savings Bank*, 165 Mass. 273, *Brown* v. *Wentworth*, 181 Mass. 49,) but no one reading these deeds would have any reasonable doubt as to the fact that these newspapers were published in the city of Lowell. This is not true of the newspaper called "L'Etoile." There is nothing about this name to indicate the place of its publication. Although the words of the statute reach only to "the name of the newspaper," yet in order to show the existence of a legal

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cause of sale the place of its publication as required by R. L. c. 13, § 1, must appear in the deed.

(b) R. L. c. 13, § 40, (now St. 1909, c. 490, Part II. § 41,) provides that the notice of sale shall be posted "in some convenient and public place." The deeds recite such posting "in city hall, a public place in said Lowell." It is not every public place which would be "convenient" for putting up notices of tax sales. City halls as matter of common knowledge are used generally for such purposes. Halls of this character exist in all municipalities, and the statement in a tax deed, that such a place is convenient for this use, affects no right of the person assessed or of the purchaser, and can add nothing to their knowledge. Under these circumstances failure to follow the prescribed form was not fatal. A quite different case would arise if the public place described was not one commonly known to be convenient for such purposes.

(c) It was a condition precedent to the right of the tax collector to sell that the advertisement should contain "the names of all owners known to the collector." R. L. c. 13, § 38, (now St. 1909, c. 490, Part II. § 39.) Omission of those names from the advertisement would deprive the collector of any cause for making the sale. All the statutory forms save that in St. 1901, c. 519, require a statement that the advertisement contained the name of the owner of the land. Without such a statement the deed in an essential particular, not fairly inferable from other parts of the instrument, fails to show the existence of a cause for sale.

(d) The narration of the terms of the advertisement set out in the deed was that the sale would be for "non-payment" of taxes, while form No. 14 was in the words that the sale would be for the "discharge and payment" of the tax. The statement in the deed was supplemental as to cause, while that in the form indicates the purpose of the sale. It is plain from the deed that the only purpose of the sale was to satisfy the tax. In this regard no substantial error appears.

(e) R. L. c. 13, § 38, (now St. 1909, c. 490, Part II. § 39,) requires that the published notice of the sale shall "contain a substantially accurate description of the several rights, lots, or divisions of the land to be sold," while by § 41, (now St. 1909, c. 490, Part II. § 42,) the collector must sell "the smallest undivided part of the land which will satisfy the taxes and neces-

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sary intervening charges, or the whole, if no person offers to take an undivided part." The deed states that the advertisement was for the sale of "the smallest undivided part of said estate" sufficient to discharge the lien. The sale was of the whole and not any undivided part. The sale could not lawfully have been made of any larger estate than had been advertised. Hence in this particular the form of deed is defective in the statement of a cause for the sale of the whole.

All sales in which this form was used were invalid. It is not necessary to determine whether these deeds were also invalid in not containing enough to warrant a fair inference as to the municipality within which the land conveyed was situated.

2. Certain lands were properly assessed to the "Heirs of George T. Woodward" and to the "Heirs of Irene E. Richardson," under R. L. c. 12, § 21, (now St. 1909, c. 490, Part I. § 21.) In these instances the records of the Probate Court for the county, in which Lowell is located, showed on the first of May of the year in which the taxes were assessed * who the heirs of Woodward and Richardson severally were and that one or more of the heirs of each resided in Lowell. The recitals in the deeds of this class were that demand was made upon "the heirs" of deceased. The collector was required to serve a demand for the payment of the tax upon every resident assessed, or in case of heirs of a deceased person, upon one of them, and to state in his deed "the name of the person on whom the demand . . . was made." R. L. c. 13, §§ 14, 43, (now St. 1909, c. 490, Part II. §§ 14, 44.) To say that a demand has been made upon the heirs of an intestate is not giving the name of the person upon whom the demand was made. The two sections cited impose upon the collector the duty of finding a resident heir, if there is one, making the demand upon him, and then naming him in the deed. To name a person is not the same as to describe him. The name of a person is the distinctive characterization in words by which he is known and distinguished from others. Such a designating appellation was not given by the words "heirs of" a person. Tax deeds lacking it are invalid. *Reed* v. *Crapo*, 127

* The collector's deeds stated that the taxes referred to were assessed for the year 1907, and that the demands for their payment above described were made on March 11, 1909.

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Mass. 39. Assessors are charged with notice of what may be found upon the probate records in determining whether to make an assessment to the heirs or devisees of one deceased. *Tobin* v. *Gillespie*, 152 Mass. 219. There is no hardship in holding the tax collector to the same investigation if necessary, in ascertaining the name of an heir.

3. The advertisement of sale in several instances was printed in English in a newspaper printed in the French language. R. L. c. 13, § 1, (now St. 1909, c. 490, Part II. § 1,) provides that "Publications, as applied to any notice, advertisement or other instrument, the publication of which is required by law, shall mean the act of printing it . . . in a newspaper published in the city or town, if any, otherwise in the county, where the land . . . is situated." English is the language of this country. This conception is fundamental in the administration of all public affairs. It is an elemental truth, so axiomatic in its nature as to need no supporting authority. It is not declared in the Constitution nor enacted by statute. It is so by the universal customs of our past in Colony, Province and Commonwealth. Apart from the more obvious considerations, there are indications that the English language is that of our institutions in the requirement that no one can be a voter or eligible to office unless able to read the Constitution in English (art. 20 of the Amendments to the Constitution), nor solemnize marriage unless able to read and write in that language. R. L. c. 151, § 30. Instruction in the English language is required in all public and private schools. R. L. c. 42, § 1; c. 44, § 2. It is plain that a general public notice required by law to be published in a newspaper must be printed in English in an English newspaper. The great weight of authority supports this view. *Auditor General* v. *Hutchinson*, 113 Mich. 245, 249. *State* v. *Chamberlain*, 99 Wis. 503. *Chicago* v. *McCoy*, 136 Ill. 344, 349. *Graham* v. *King*, 50 Mo. 22. *Road in Upper Hanover*, 44 Penn. St. 277. *Wilson* v. *Trenton*, 27 Vroom, 469. *North Baptist Church* v. *Orange*, 25 Vroom, 111. *Publishing Co.* v. *Jersey City*, 25 Vroom, 437. *John* v. *Connell*, 71 Neb. 10, 16. *Cincinnati* v. *Bickett*, 26 Ohio St. 49. There are decisions having a contrary appearance in *Richardson* v. *Tobin*, 45 Cal. 30, *Loze* v. *Mayor & Aldermen of New Orleans*, 2 La. 427, and *Kernitz* v. *Long Island City*, 50 Hun, 428. So far as they are in conflict

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with the principle here stated we are not inclined to follow them. The deeds which rest upon a publication of the advertisement in a newspaper printed in French are invalid.

4. Certain lots of land not of the character indicated in St. 1909, c. 490, Part II. § 50, (formerly R. L. c. 18, § 49,) are described in the deeds by lot numbers, the street and side of street on which located, and the name of all abutting owners, with the general points of compass on which the land of abutting owners lay, but without further designation by metes and bounds, and without reference to any plan upon which the lot as numbered may be found. A sample description of this kind was "three thousand seven hundred fifty-five (3755) sq. feet of land, more or less, being lots 549–550 on the east side of Tanner Street with land now or formerly of Woonsocket Institution for Savings on the north and south, Merchants Street on the east, and Tanner Street on the west." While this description reached nearly to the line of indefiniteness, it is on the whole sufficient. It gives data enough to enable one to make a reasonable identification of the property. It indicates a parcel of specified area, rectangular shape, lying between two streets and between lots of other defined owners, presumably a portion of a large tract subdivided into smaller parts. Practically the same information is conveyed in the instances when the rear of the lots bound, not upon a street, but upon another named owner. As matter of common knowledge it is a kind of description not infrequently found in deeds, especially of land in the country. To require a greater particularity would impose upon the tax collector the necessity of an expensive survey in many cases. While the descriptions in a tax advertisement must be such as to enable both owner and bidder from its terms to locate with substantial certainty the land to be sold, it need not be so detailed as to point out visually its precise boundaries so that an utter stranger unacquainted with the locality and ignorant of the neighbors could find it without inquiry. Applying the rule laid down in *Williams* v. *Bowers*, 197 Mass. 565, 567, and the numerous cases there cited, and bearing in mind that one executing only a statutory power in the sale of land must be held to some strictness, the conclusion follows that there is no invalidity in the deeds of this class.

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5. The same rule governs the deeds, where the description is similar in all respects to those last discussed, except that the land is said to be a "part of lots" whose numbers are given. Lot numbers without reference to any plan upon which they may be found plotted are of no further assistance in either case than to convey the information that the parcel described is a subdivision of a larger tract. The sufficiency of the description rests on its other elements.

6. An assessment of land was made to a person not in possession but holding a tax collector's deed thereof, valid on its face and duly recorded, who had failed by inadvertence to file in the registry of deeds or with the city treasurer the statement of his residence and place of business required by R. L. c. 13, § 45, (now St. 1909, c. 490, Part II. § 46.) This section is chiefly for the benefit of the owner in furnishing him information as to where to find the person to whom he may make tender for purpose of redeeming. He has, however, the alternative or cumulative right to make payment to the tax collector. St. 1902, c. 443, (now St. 1909, c. 490, Part II. §§ 61, 62.) It is not necessary to decide what effect, upon the rights and obligations between themselves of one entitled to redeem and one holding a tax title, the failure of the latter to comply with said § 45 may have. The tax law contains no provision that omission to record such certificate shall render the sale invalid, as it does respecting the time within which the deed shall be recorded. R. L. c. 13, § 43, (now, with subsequent amendments, St. 1909, c. 490, Part II. § 44.) The thing required by said § 45 can be done only subsequent to the record of the tax deed. Its substance does not relate to any matter inherently affecting the title, but solely to facilitating the ease of redemption. As a general rule assessors in levying subsequent assessments and the tax collector in selling thereunder may treat the holder of a duly recorded tax deed valid on its face as the record owner. *Rogers* v. *Lynn*, 200 Mass. 354. *Solis* v. *Williams*, 205 Mass. 350, 353. The purposes of the requirements of said § 45 do not appear to include an obligation upon the assessors to make a further examination of the record, beyond finding a duly recorded valid looking tax deed, to ascertain whether the holder has recorded also the necessary certificate and to determine at their peril the sufficiency of its

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form and whether it has been recorded within a reasonable time. Whatever may be other effects of the failure of the purchaser to record such certificate, the tax deed is not so affected thereby as to furnish no basis for subsequent assessments. See *McNeil* v. *O'Brien*, 204 Mass. 594, 597. The deeds questioned upon that ground are sufficient in that regard.

7. Certain deeds now challenged were made on sales of real estate not within the terms of R. L. c. 13, § 49, (now St. 1909, c. 490, Part II. § 50,) assessed to persons as owners whose title was under tax deeds, in each of which the land was described only by its area in square feet, more or less, the street and side thereof on which it was located, and the number of the lot without reference to any plan. In fact, there was a private plan on record at the registry of deeds and a plan at the office of the city engineer, on which the several lots could be sufficiently identified. This description was insufficient. It differs from those discussed under paragraphs 4 and 5 of this opinion, in that the names of no abutting owners were given, nor was there anything to show the shape of the parcel. The designation of it by a lot number without naming the plan or showing where it might be found or giving any other descriptive circumstance was too indefinite. The tax deed was also in the form held insufficient in an earlier part of this opinion. These deeds were therefore invalid on their face and on inspection show that they convey no title. The question is whether one holding under such a deed invalid on its face "is a person appearing of record as owner" within the meaning of those words in R. L. c. 12, § 15. (See St. 1909, c. 490, Part I. § 15.) The rule established by *Butler* v. *Stark*, 139 Mass. 19, that the holder of a tax deed was such a record owner has been applied in *Roberts* v. *Welsh*, 192 Mass. 278, and *Welsh* v. *Briggs*, 204 Mass. 540, 552, to cases where the tax deeds, good on their face, were invalid by reason of some error in the original assessment or otherwise, not apparent upon an examination of the deed itself. But the rule has never been extended to a case where the tax deed showed on its face that it conveyed no title. A tax deed stands or falls on its own unaided merits. It must be delivered and recorded within thirty days from the sale. Its worth is to be determined as of that date. It cannot be supplemented or changed by subsequent

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instruments. Its errors and inaccuracies cannot be corrected, nor can its defects be supplied from any source. When by its terms it is obvious that it does not convey a title, it fails utterly to affect the rights of the original owner. He remains the only person "appearing of record as owner" of the property. It follows that assessments based upon a tax deed which is invalid on its face is not an assessment to an owner of record. Sales founded upon such an assessment are void.

These determinations dispose of all the deeds in question and it is not necessary to discuss the other points argued.

The result is that the judgments entered in the Superior Court in the actions in which Dennis E. Conners and Joseph Walsh are the plaintiffs are affirmed. The judgment in the action, in which Edward F. Conners is the plaintiff, is reversed.

So ordered.

FRANK A. NOYES *vs.* MILTON L. CUSHING & others.

Suffolk. January 18, 19, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Equitable Restrictions. Equity Pleading and Practice, Decree.

A restriction, imposed by the owner of a number of lots in a tract of land on a certain street in furtherance of a general scheme for the benefit of them all, that no building "shall ever be erected within fifteen feet of" the line of the street "and no mechanical shop, livery stable, or store shall ever be erected or used on said parcel which shall be detrimental to the use of this locality for dwelling houses," does not prevent as matter of law the erection upon one of the lots of a building which is not a dwelling house and which is used as a place of storage of merchandise not brought to or taken from the building over the street in question, and also for the storage of automobiles, but not as a garage.

At the hearing in the Superior Court of a suit in equity by the owner of a lot of land upon a certain street against the owner of an adjoining lot to enforce a restriction, applying to all the lots on the street, that no building "shall ever be erected within fifteen feet of" the line of the street "and no mechanical shop, livery stable, or store shall ever be erected or used on said parcel which shall be detrimental to the use of this locality for dwelling houses," the evidence was conflicting, and findings were warranted that the defendant was proposing to erect on his lot a building to be used in connection with a store maintained by him on an adjacent and parallel street. The presiding judge ordered a decree enjoining the defendant from using the proposed building as a store for the sale of goods on the street upon which it stood, but permitting him to use it for the storage of merchandise and as a "garage for the storage of automobiles or as a storage warehouse." On appeal by the plaintiff it was *held,* that the use of the

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building as a "garage for the storage of automobiles" would or might be detrimental to the use of the street for dwelling houses, and that the decree should be modified by striking out that part of it, the defendant being given leave to apply to the Superior Court to have the decree include a provision, if that court saw fit, permitting the use of the building for the storage of automobiles but not as a garage; and it was *further held* that the decree should be modified further by enjoining the defendant from using the building for the reception and delivery of goods to be sold in the store on the adjoining street, and from using the street on which the proposed building was to stand for the transportation of goods and merchandise in connection with such store.

MORTON, J. The plaintiff and the defendants are owners of adjoining lots on Creighton Street in Cambridge, each of which, in common with other lots on Creighton Street, is subject to the following building restrictions, namely: "No building shall ever be erected within fifteen feet of said line of Creighton Street, and no mechanical shop, livery stable, or store shall ever be erected or used on said parcel which shall be detrimental to the use of this locality for dwelling houses."

This is a bill to restrain and enjoin the defendants from erecting a building on their lot in violation of these restrictions. There was a decree * restraining the erection of a building within fifteen feet of Creighton Street and enjoining the defendants from using the building as a store for the sale of goods on Creighton Street, but permitting them to use the building for the storage of hay, grain and other materials or as a garage for the storage of automobiles or as a storage warehouse. The decree also restrained the defendants from using Creighton Street to haul hay or straw to and from said building. The plaintiff appealed from the decree. The evidence was taken by a commissioner and is all before us.

The defendants own an elevator and store on Regent Street which is next southerly from and parallel to Creighton Street, where they deal in hay, grain, straw, flour and other products. The lot on Creighton Street adjoins in the rear their premises on Regent Street and the building on Creighton Street is intended to be used in connection with the store on Regent Street for storing hay, grain, flour and other things that the defendants deal in. The great bulk of deliveries, — ninety per cent, one witness testified, — will be made from the store on Regent Street. But there was testimony tending to show that some

* After a hearing, by *Richardson*, J.

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deliveries might be made from the building on Creighton Street. The evidence tended to show that Creighton Street is and always has been almost entirely a residential street; and the presiding judge must be deemed to have found that, as alleged in the bill, the restrictions upon the lots of the plaintiff and of the defendants were imposed as a part of a general scheme for the benefit of other lots on Creighton Street, and that the plaintiff was entitled to enforce such restrictions against the defendants. He must also be deemed to have found that there had been no such change in the locality intended to be benefited by the restrictions as to render it inequitable to enforce them. If the question of the correctness of these findings is open, we do not see how it can be said that they were plainly erroneous. The plaintiff does not find fault with them, as indeed he could not, but he contends that according to the proper construction of the restrictions only a building intended for a dwelling house can be erected on the defendant's lot, or, if that is not so, that the building in question which, we infer, has been erected in the main as planned since the decree was entered, is or may be "detrimental to the use of the surrounding locality for dwelling houses," and for that reason should be removed.

The restrictions, while forbidding the use or erection of a building for a "mechanical shop, livery stable, or store," contain no express provision limiting the use of the lot to the erection of a building for a dwelling house. On the contrary the implication from the provision that no building "shall ever be erected or used on said premises which may be detrimental to the use of the surrounding locality for dwelling houses" is that a building of a different character may be erected so long as it or the use to which it is put will not be detrimental to the use of the surrounding locality for dwelling houses. It was no doubt expected that the effect of the restrictions would be to impose upon the locality to which they applied a residential character. But in the absence of anything in them limiting the buildings to be erected to dwelling houses we do not see how the restrictions can be so construed.

The question whether the erection of such a building as the defendants have erected and whether its use for the storage of hay, grain, flour and other merchandise which they deal in

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would be detrimental to the use of the surrounding locality for dwelling houses is largely if not wholly one of fact. The presiding judge found apparently that the building and the use of it as contemplated would not be detrimental if the building was not to be used as a store and goods and merchandise were not to be hauled through Creighton Street to and from it. The evidence upon the subject was contradictory, and it plainly cannot be said, we think, that his finding was wrong. We think, however, that the use of the building as a garage for the storage of automobiles would or might be detrimental to the use of the street for dwelling houses, (see *Daly* v. *Foss*, 199 Mass. 104; *Evans* v. *Foss*, 194 Mass. 513,) and that the decree should be modified by striking out that part of it, with leave to apply to the Superior Court to have the decree include a provision, if it sees fit, permitting the use of the warehouse for the storage of automobiles but not as a garage. We think that it should also be modified so as to restrain and enjoin the defendants not only from using said building as a store for the sale of goods on Creighton Street and from transporting merchandise to and from said building through Creighton Street, but also from using said building as a store for the reception or delivery of goods sold or to be sold in the Regent Street building, and from transporting goods and merchandise through Creighton Street in connection with the Regent Street store. As thus modified the decree will be affirmed. *So ordered.*

W. A. Hayes, for the plaintiff.

H. I. Cummings, for the defendants.

CITY OF NEWBURYPORT *vs.* CHARLES E. DAVIS, executor.

Essex. January 19, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Bond, Construction, Breach. *Municipal Corporations*, Officers and agents. *Damages*, In action of contract: bond.

A bond with sureties, given to a city by its treasurer and collector of taxes, after reciting the election of such officer "for the current municipal year," provided that, if he "shall well and truly perform all of the duties and responsibilities which devolve upon him by virtue of his acceptance of the two offices aforesaid during the term for which he has been elected and for such further term or

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terms or portion of a term for which he may be elected or for which he may serve and if [he] shall annually not later than the first Monday in February, obtain the approval in writing of the mayor and aldermen of said city . . ., then this obligation shall be void, otherwise it shall remain in full force." The officer was elected for several successive years without a new bond being given. *Held*, that, the obtaining of "the approval of the mayor and aldermen," whatever that provision in the bond might mean, not being a condition precedent to the continuation of the obligation, the obligation expressed in the bond was not limited to the current municipal year, but continued through successive years of continuous election to and service in the offices of treasurer and collector of taxes.

The mere fact that a bond given to a city by its treasurer and collector of taxes, which by its terms was a continuing obligation during successive terms of office of the obligor, was not approved by the mayor and aldermen as required by R. L. c. 25, § 72; c. 26, § 2, and by ordinances of the city, will not prevent recovery thereon by the city in case of its breach, if it is good as a common law bond.

In an action by a city upon the bond of its treasurer and collector of taxes, negligence of other officers of the city in not discovering defalcations of the treasurer which constituted the breaches of the bond is no defense.

A bond given to a city by its treasurer and collector of taxes, which by its terms is a continuing liability during the current term of that officer and successive terms for which he is elected and in which he serves, is terminated by the giving of a new bond of the same character.

In an action by a city against a surety upon a bond given by its treasurer and collector of taxes, it appeared that the treasurer had embezzled large sums of money which were in his possession as treasurer, and then fraudulently had issued notes of the city which he had power to negotiate as a borrowing agent of the city and had applied the proceeds thereof to cover his direct embezzlements as treasurer. The defendant contended that the wrongdoing which had resulted in financial harm to the city was not a wrongdoing of the treasurer or collector of taxes, and therefore that the defendant was not liable. *Held*, that the character of the original embezzlement of the treasurer, which constituted a breach of the bond, was not changed by its temporary concealment through his fraudulent acts as borrowing agent of the city.

Although, in an action against the surety upon a bond for a penal sum conditioned upon the proper performance of his duties by a public official, if there is a verdict for the plaintiff, judgment is entered for the penal sum of the bond and the amount of the execution is determined later, there is no reason for not determining the amount for which execution should issue at the same time with the question of liability when the record is ripe for it. Such a case arises when the record shows that the loss sustained by the obligee far exceeds the penal sum of the bond.

In an action by a city against a surety upon the bond of its treasurer and collector of taxes, it appeared that the treasurer had embezzled a large amount of money which he had replaced with the proceeds of a note which he had negotiated fraudulently as borrowing agent of the city, and that at the time of the trial of the action upon the bond, an action against the city upon such note was pending. *Held*, that the initial embezzlement constituted a breach of the bond and therefore that judgment should be entered for the plaintiff, and that the amount for which execution should issue should be determined after the termination of the action upon the note.

CONTRACT in three counts upon three bonds, upon each of which the defendant was a surety to the amount of $2,000, which

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were given to the plaintiff by James V. Felker, its treasurer and collector of taxes, and are described in the opinion. The first count was upon a bond dated January 1, 1894; the second, as amended, upon a bond dated January 1, 1898, and the third upon a bond dated January 1, 1902. Writ dated July 16, 1908.

The case was referred to Henry T. Lummus, Esquire, as auditor, who found for the plaintiff on the second and third counts for the full amount of $2,000 and interest from the date of the writ. As to the first count, he found "that the plaintiff is not entitled to recover . . . unless the bonds are to be taken as cumulative and not substitutional, in which case the plaintiff is entitled to recover" $2,000 and interest.

That part of the report of the auditor which related to liability under the first count was as follows:

"It appears that Felker embezzled $86,800 during his career as city treasurer. It appears, however, except for the $80,000 of fraudulent notes [described in the opinion] outstanding on May 11, 1906, that the only amount the city could lose was $6,800. Any loss beyond the $6,800 must come through the payment of fraudulent notes. The city has paid on a judgment the sum of $65,632.26, which judgment was founded on notes, the principal of which amounted to $55,000. Another fraudulent note for $25,000 remains outstanding, upon which a suit is now pending against the city in the courts of this State. . . . If the city does not have to pay that note, the loss resulting from Felker's embezzlements will be considerably reduced by reason of the money obtained by him upon that note and turned into the city treasury. . . . But it seems that the sureties are entitled to the benefit of Felker's payment into the treasury so far as it makes good his embezzlement, no matter how he obtained the money to make the payment. And it seems that such payment would be applied to satisfy the earlier items of embezzlement, with the result that more than $14,000 of the earlier items would be satisfied. . . . Such a result would discharge all liability under the bond of January 1, 1894, if the bonds are held to be substitutional and not cumulative.

"The vital point in this connection is, whether the outstanding $25,000 note can be collected from the city. There was no evidence before me on that point, other than that stated in this

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report. It seems clear that the burden of proof is upon the plaintiff to show a breach of the bonds, as well as the amount of damage resulting from such breach. . . . Ordinarily these two questions are taken up separately . . . but in the present case there seems to be no doubt that the full $2,000 can be recovered upon each bond in this case, if anything can be . . . so that any hearing on the assessment of damages seems unnecessary. The burden being on the plaintiff to prove a breach of each bond, I am unable to find from the evidence before me that the outstanding note for $25,000 will or can ever be collected from the city, or that there is any shortage in the official accounts of said Felker for the period after the giving of the bond of January 1, 1894, and before the giving of the bond of January 1, 1898."

The case was heard by *Raymond*, J., the parties agreeing that the facts stated in the auditor's report were true, and no other evidence being introduced. The judge "ruled *pro forma* in accordance with the auditor's rulings" and reported the case for determination by this court.

Other facts are stated in the opinion.

R. G. Dodge, (*A. Withington* with him,) for the plaintiff.

J. P. Sweeney, (*J. F. Hannon* with him,) for the defendant.

RUGG, J. This is an action against one of the sureties upon three several bonds, dated respectively January 1, 1894, January 1, 1898, and January 1, 1902, given to the plaintiff city by one Felker, its treasurer and collector of taxes from 1883 to 1906, who embezzled large sums from the plaintiff in and subsequent to 1896.

The bonds are identical in the condition which, after reciting the election of Felker to the office "for the current municipal year," provides that if he "shall well and truly perform all of the duties and responsibilities which devolve upon him by virtue of his acceptance of the two offices aforesaid during the term for which he has been elected and for such further term or terms or portion of a term for which he may be elected or for which he may serve and if the said James V. Felker shall annually not later than the first Monday of February, obtain the approval of the mayor and aldermen of said city of Newburyport, then this obligation shall be void, otherwise it shall remain in full force."

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1. The bond is aptly phrased to express a continuing obligation for the current year and for each successive year of continuous elections to or service in the offices named by the principal obligor. There can be no doubt of its binding force in this regard. *Chelmsford Co.* v. *Demarest*, 7 Gray, 1, 3. *Middlesex Manuf. Co.* v. *Lawrence*, 1 Allen, 339. *Lexington & West Cambridge Railroad* v. *Elwell*, 8 Allen, 371. *Singer Manuf. Co.* v. *Reynolds*, 168 Mass. 588, and cases cited at page 590. *O'Brien* v. *Murphy*, 175 Mass. 253. But it is contended that the language in the bond to the effect that Felker shall annually "obtain the approval of the mayor and aldermen" interposes as a condition precedent to the springing into being of liability under subsequent elections a renewed annual approval of the bond, and that accordingly his failure to comply with this condition prevents the continuing obligation feature of the bond from becoming vital and effective. While perhaps an instrument might be so framed as to express this purpose, the language of this condition does not do so. The meaning of this clause is not plain. It may perhaps be construed to require Felker to get an approval of himself, that is an auditing and an expression of satisfaction with his accounts, or that the bond should be presented anew to the proper city board as additional security to the general sureties in the event of the death or impaired financial standing of any of them. But whatever its exact significance, it does not purport to cut down the continuity of obligation unequivocally set forth in the earlier part of the sentence. It does not state a limitation upon liability, but a requirement of the doing of something by Felker, default in performance of which raises an additional ground of liability on the part of the sureties. There is no ground for reversing the literal and grammatical meaning of words in order to effectuate a mere conjecture based upon a subsequent unanticipated event as to what might have been the intent of the parties in drafting a somewhat obscure sentence. These bonds expressed an obligation to the plaintiff arising upon each successive election to office of the principal obligor.

2. Although the statute and ordinance required bonds to be given satisfactory to and approved by the mayor and board of aldermen, it is not necessary to decide whether these were so

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approved for the reason that they were valid as common law obligations. *Farr* v. *Rouillard*, 172 Mass. 303, 305, and cases cited.

3. The negligence of other officers of the plaintiff in not discovering the defalcations of Felker is no defense to this action. *Hudson* v. *Miles*, 185 Mass. 582, 587.

4. The bonds are not cumulative, but substitutional in their nature. It often happens that when a new bond is given voluntarily and unqualifiedly, not in accordance with a requirement of statute, ordinance or by-law, but by reason of agreement or in response to demand or on account of changed conditions or in other ways without compulsion it is held to be concurrent with previous like obligations. *Forbes* v. *Harrington*, 171 Mass. 386, and *Hudson* v. *Miles*, 185 Mass. 582, 587, illustrate this principle. But these bonds were given by the incumbent of a public office which by law must be filled by an annual election. It requires plain and definite language to extend liability beyond the term of office for which the bond is given. When expressly continuing to future official terms, the nature of the sureties' liability on such obligations is such that it ought not to be stretched beyond its fair import. It was an implied condition growing out of the character of the offices held, and the general provisions of law touching them, that a new bond executed, delivered and approved by the proper authorities upon a new election should put an end to liability upon the old bond for defaults accruing thereafter. See *Richardson School Fund* v. *Dean*, 130 Mass. 242, 244.

5. The attempt has been made by the defendant to distinguish the capacities in which Felker injured the city, and to fix the wrongdoing which resulted in financial harm to the city upon him in some other capacity than that of treasurer. It is urged that he covered his direct embezzlements with the proceeds of notes which he was enabled to negotiate as a borrowing agent of the city under the authority of ordinance, and that his misappropriations in this capacity were not made as treasurer, and hence the defendant is not liable. But according to the facts found Felker took the money of the city either by drawing checks upon its bank deposits or by filching the cash from its drawer. That he succeeded in temporarily concealing his shortage by proceeds

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of notes in the name of the city, which he in fact had no right to issue, does not affect the character of his initial embezzlement. The essence of the transactions cannot be changed in this way. All that he did was in violation of his duty as treasurer. As there has been recovery against the city upon a considerable amount of these notes which were fraudulently put out by Felker, the city has been left as it was at the first, defrauded by the original embezzlement. Each bond is a security for all that was stolen during the period covered by it.

6. Frequently in cases of this sort judgment is entered for the penal sum of the bond, and the amount of the execution is determined later. *Choate* v. *Arrington*, 116 Mass. 552. But there is no reason for not determining the amount for which execution should issue at the same time with the question of liability when the record is ripe for it. *Hudson* v. *Miles*, 185 Mass. 582, 588.

The loss to the city arising from the breach of the bonds of 1898 and of 1902 far exceeds the penal sum. Hence upon the counts on these bonds the plaintiff is entitled to recover the full penal sum, to wit, $4,000, with interest from the date of the writ.

It is plain also that there was a breach of the bond of 1894. Embezzlements occurred during the period covered by it. In any event judgment should be entered for a technical breach. Upon this point the only question is whether restitution was made from the proceeds of a $25,000 note wrongfully issued by Felker, the proceeds of which placed to the credit of the city helped to conceal his deficits. Action against the city upon that note is pending. Recovery has been had against the city upon several notes similar in all respects to the one in suit. *Citizens' Savings Bank* v. *Newburyport*, 169 Fed. Rep. 766. The plaintiff made out a *prima facie* case by showing a breach of the bond. Such case is not met by showing a restitution made from the proceeds of several notes wrongfully issued by the treasurer in the name of the city, all but one of which the city has been compelled to pay and is defendant in a pending action upon that one. *Temple* v. *Phelps*, 193 Mass. 297, 302. The exact loss of the plaintiff cannot be determined until the conclusion of that litigation. But the plaintiff is entitled to a judgment upon a technical breach in the condition of the bond. The amount for which

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execution ought to issue on this bond should be settled after the end of the action upon the $25,000 note.

Let the entry be

Judgment for the plaintiff upon the first, second and third counts; execution to issue upon the second and third counts; amount for which execution should issue on the first count to be determined later.

CHARLES U. COTTING & another, trustees, *vs.* LAWRENCE MURRAY & others.

Suffolk. January 23, 24, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Way, Private.

The owner of a large tract of land in 1842 conveyed to one W a lot therefrom with a right of way from it over "a five feet passageway to be laid out by" the grantor to a street near by. Three months later he conveyed to W other land adjacent to the first lot and bounded on one side by another "passageway not less than five feet wide leading to" the same street, it being stated in the deed that the second parcel was designed as an enlargement of the first, the deed also granting "a free and uninterrupted right of passing and repassing in, upon and over said passageway not less than five feet wide laid out by us . . . in common with us . . . said easements to be enjoyed as appurtenant to the land conveyed . . . both by these presents and by our said former deed." At the time of the second deed, the passageway mentioned therein was in existence and was twelve feet wide from the street to a point in the middle of the line of W's lot bounding thereon, and it continued through other land of the grantor five feet wide. Afterwards the grantor made it twelve feet wide to a point beyond W's lot and laid out an extension of it fifteen feet wide at right angles to it from a point just beyond W's lot. Each arm of the passageway ended in a *cul de sac*. The fifteen foot arm was rendered inaccessible to teams and carriages by posts at its entrance. A brick sidewalk four feet wide was built along the side of the original passageway by abutters who afterwards purchased lots from the tract along one side of it. From 1842 to 1892 W and his successors, with the common consent of the abutters, maintained a post in the way opposite his premises for the purpose of preventing teams and carriages from using the way beyond it. The way was paved with cobblestones by W and others at first only from the street to the post, and later beyond the post. From the street to the post the way was used for teams and carriages with the consent of all abutters on the passageway. In 1892 a successor in title to W removed the post and certain of the abutters sought in equity to restrain him from using the way for teams and vehicles, and to limit him to a five foot passageway. *Held*, that, because the wording of the

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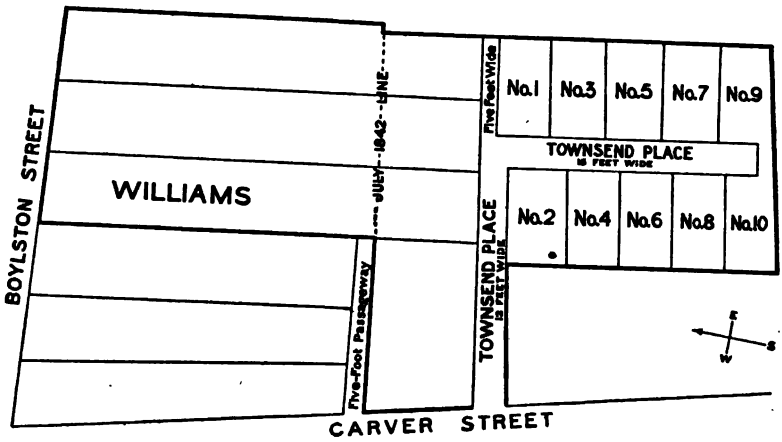
second deed to W did not limit the way to five feet and it was treated by common consent by all parties as twelve feet in width, it must be regarded as of that width; and also that the setting up and maintenance of the post by W and his successors by common consent did not prevent a later successor of W from withdrawing his consent to such limitations of the use of the way or from insisting upon his right to use the entire way in front of his premises and to the street in the same way.

Where an indefinite way has been granted by deed and either at the time of the grant or afterwards it is practically located and determined by common consent of the grantor and the grantee and as thus located is used and acquiesced in by all parties interested for a long term of years, the way so located and determined will be regarded as the way intended to be granted by the deed.

BILL IN EQUITY, begun by a writ of attachment containing a bill of complaint, dated November 16, 1892, and filed in the



Superior Court on December 5, 1892, by the owners of the lot marked "Williams" on the accompanying plan, seeking to enjoin the defendants, owners of other lots abutting on Townsend Place, from interfering with the plaintiffs' use thereof and to have the defendants asked to remove a certain post placed by them in the way, and for damages; also a

CROSS BILL in which some of the defendants, owners of lots numbered 1, 3, 5, 7, 8 and 10 on the plan, sought to enjoin the plaintiffs from using Townsend Place for horses and carriages and to limit them to the use of a way five feet wide.

The case was referred to Charles E. Grinnell, Esquire, as master, who filed a report to which was attached a "sketch map," from which the accompanying plan is made.

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From the report it appeared that the land conveyed to Williams on July 12, 1842, as stated in the opinion, was that part of the lot marked "Williams" lying between Boylston Street and the dotted line with the words and figures "July 1842 Line" upon it, and that the lot conveyed to him on October 19, 1842, was the lot between that line and Townsend Place.

All the land included in the heavy lines on the plan belonged to the Townsend heirs at the time of the first conveyance to Williams.

Other facts are stated in the opinion.

Exceptions to the report were overruled by *Wait*, J., and a final decree was entered, as stated in the opinion, granting the prayers of the bill and dismissing the cross bill. The plaintiff in the cross bill, and those of the defendants in the original bill against whom the decree was, appealed.

J. L. Putnam, (*R. W. Hill* with him,) for the plaintiffs.

R. S. Warner, for the defendants.

MORTON, J. The plaintiffs are the owners of a lot of land in Boston, bounded northerly on Boylston Street and southerly on a way called Townsend Place. Townsend Place extends easterly and southerly from Carver Street, and forms at its easterly and southerly ends a *cul de sac*. That part on which the plaintiffs' premises abut is twelve feet wide. From a short distance beyond the plaintiffs' premises to the easterly end it is five feet wide. The southerly portion is fifteen feet wide. This is a bill to restrain the defendants from obstructing the plaintiffs in the use of the way by maintaining a gate or post or any other obstruction therein. A cross bill was filed by certain of the defendants to restrain the plaintiffs from using said way for teams and carriages and to enjoin them from making any use of said Townsend Place except to the extent of a five foot passageway. The case was sent to a master who found in favor of the plaintiffs in the original bill and against the plaintiffs in the cross bill. Exceptions to the report were filed by certain parties who were defendants to the original bill and plaintiffs in the cross bill. The exceptions were overruled and a decree was entered in favor of the plaintiffs in the original bill with costs against certain defendants, and dismissing it with costs as to other defendants, and dismissing the cross bill with costs. The plaintiffs in the

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cross bill and the defendants in the original bill against whom the decree ran appealed. The appellants are owners of lots abutting on the southerly extension of Townsend Place, and henceforth we shall speak of them as the defendants and of the plaintiffs in the original bill as the plaintiffs.

The lots belonging to the plaintiffs and the defendants respectively, as well as Townsend Place itself, originally constituted a part of a tract of land belonging to certain persons called the Townsend heirs. On July 12, 1842, they conveyed to the plaintiffs' predecessor in title, one Williams, a lot bounded on the south by other land of the grantors, "with a free and uninterrupted right of passing and repassing in, upon and over a five feet passageway to be laid out by us to and from Carver Street in common with us, our heirs and assigns, and of draining under the same, subject to payment of a proportionate part of the cost of keeping in repair said passage way and drain." Subsequently, on October 19, 1842, another lot of land was conveyed to the plaintiffs' predecessor in title by the same grantors, which lot of land was described as bounding northerly on the lot previously conveyed and "southerly by a passage way not less than five feet wide leading to Carver Street." The deed then proceeded as follows: "Said parcel of land being designed as an enlargement of the tract of land conveyed to said Williams by our said former deed, with a free and uninterrupted right of passing and repassing in, upon and over said passageway not less than five feet wide laid out by us to and from said Carver Street in common with us our heirs and assigns and of draining under the same, subject to payment of a proportionate part of the expense of keeping in repair said passage way and drain, said easements to be enjoyed as appurtenant to the land conveyed to said Williams both by these presents and by our said former deed." Like conveyances of the two lots easterly of that thus conveyed to the plaintiffs' predecessor in title were made to the two parties to whom the two lots easterly of that originally conveyed to Mr. Williams had been deeded. At the time when these last conveyances were made the passageway in question on which they bounded was laid out twelve feet wide from Carver Street to a point about half way along the southerly line of the plaintiffs' lot and five feet wide for the rest of the distance. Subsequently the passageway was widened by

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the grantors to twelve feet to a point beyond the lot conveyed to Mr. Williams, remaining five feet wide for the rest of the distance easterly, and was extended southerly with a width of fifteen feet. This was in 1844 or thereabouts and the way has remained ever since as thus laid out. At the time when the southerly extension of the way was laid out, posts were set across the northerly end of it where it joined the twelve foot way running east and west and have been maintained there ever since. The southerly extension has thus been rendered inaccessible to teams and carriages. A brick sidewalk three or four feet wide was built by abutters along the northerly side of the way from Carver Street to its easterly end, and Mr. Williams caused a post to be set in the passageway a little easterly of the west line of his lot projected southerly, and midway between the edge of the sidewalk and the southerly line of the way. From the time when this post was set until 1892, when the premises occupied by Mr. Williams were altered over for business purposes, a post has been maintained by Mr. Williams and others, by common consent, for the purpose of preventing teams and carriages from using the way beyond the point where it was set. Mr. Williams and others caused the way to be paved with cobblestones from Carver Street to the post, and later beyond that, and since the post was placed there the way has been used at all times from Carver Street to the post for teams and carriages by and with the consent of every owner and occupant of premises abutting on Townsend Place. In 1892 Mr. Williams removed the post. Thereupon another post was put there by one of the plaintiffs in the cross bill, which was also removed. A gate was then erected, which also was removed with another gate that was erected in its place. Then this bill was brought by the plaintiffs in November, 1892.

The plaintiffs contend first that they and the other parties to this litigation have under their respective deeds from the Townsend heirs the right to use the passageway from Carver Street to its easterly end on foot and with teams and vehicles; secondly, if that is not so, then they contend that as owners of the fee of that part of Townsend Place which runs easterly from Carver Street, to which they have acquired title since this suit was begun, they have a right to use it for teams and vehicles in

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connection with their adjoining premises fronting on Boylston Street, and to enjoin the defendants from making such use of it. The defendants contend that the plaintiffs have a right of way only five feet wide for foot travel, and they seek to limit the plaintiffs to that and to enjoin them from using the way for teams and vehicles, it appearing that such use has materially interfered with the letting of houses on the southerly extension of Townsend Place for residences or rooms, and has caused a diminution of the rents.

We think that the decree was right and should be affirmed. The lot is described as bounded "southerly by a passage way not less than five feet wide leading to Carver Street." The way is described not as five feet wide and no more, as in the previous conveyances, but as "not less than five feet wide," thus limiting the minimum but not the maximum width. The same language occurs later in the deed. If the grantors had intended to limit the grantees to a passageway five feet wide and no more it is difficult to understand why in view of the apt language of the previous conveyances they did not do so. On the other hand the indefiniteness of the way granted in the deed is accounted for by the fact that although a portion of the way was already indicated on the surface of the earth as twelve feet wide, the grantors had not finished laying out and disposing of the rest of their land, and might well prefer to leave the final width of the way undetermined while guaranteeing that in any event it should not be less than five feet wide. Moreover the right of passing and repassing over and upon the passageway is given to the plaintiffs "in common with us (the grantors) our heirs and assigns." This can mean nothing else, it seems to us, than that the plaintiffs are to have the right of passing and repassing over the way as finally located by the grantors, whatever the width might be. While in a sense no doubt the way in question was intended as a substitute for the way contemplated in the previous conveyances, it is plain, we think, that it was not intended that it should be limited to the same width. Moreover it could not have been intended as a substitute in the case of Mr. Williams, since the five foot way was left open from his premises to Carver Street and no release was required from him as there was in the case of the grantors of the two lots easterly. The

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setting out and maintenance of the post cannot be held, we think, to have affected the rights of the parties. It was maintained by common consent on the part of the abutters, and when such consent was withdrawn by one or more of them the parties were left to their rights under their deeds.

We think that the case comes within the principle that where an indefinite way has been granted and is either at the time or afterwards by the common consent of the grantor and grantee practically located and determined, and as thus located is used and acquiesced in by all parties interested for a long term of years, it will be regarded as the way intended to be granted by the deed. *Bannon* v. *Angier*, 2 Allen, 128. The case differs from that of *Stetson* v. *Curtis*, 119 Mass. 266, relied on by the defendants, for the reason that in the present case it is manifest that the whole width of the passageway was intended by the grantors to be used as a way.

Whether the plaintiffs acquired any greater or different rights in regard to their use and the use by others of the passageway by their purchase of the fee of it from what they had before, it is not necessary to consider.

Decree affirmed with costs.

WILLIAM A. COPELAND *vs.* WILLIAM G. EATON & others.

Suffolk. January 24, 25, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Contract, Construction. *Patent. Words*, "Interest."

In a suit in equity for the specific performance of a contract, it appeared that the defendant was the owner of a patent for a certain machine and that the plaintiff and the defendant made a contract in writing that the plaintiff should have an exclusive license to manufacture and sell the patented machine for five years, the seventh paragraph of the contract stating in detail a method of accounting for and of dividing the profits of the enterprise. The eighth paragraph provided in substance that, if "at the expiration of said licenses and of this contract" the defendant did not desire to renew the contract for a further term, he should "deliver such transfers, papers and instruments as will vest in the [plaintiff] . . . fifteen one-hundredths interest in and to said patent, . . . and also fifteen one-hundredths interest in and to all the profits arising from business in machines during the life or lives of said patents . . . and also

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twenty one-hundredths interest in and to all the profits arising from the sale of rolls, spare parts and supplies furnished to said machines or protected in any manner by the patents aforesaid. Profits within the meaning of the foregoing provisions," it was provided, should "mean the differences between the manufacturing cost and the amount of the receipts in each instance as hereinbefore defined in Article VII., and all the provisions of that article shall apply to the parties hereto *mutatis mutandis*. And in the event the" defendant should desire "to sell said patent or patents and business done under them, and . . . obtain a *bona fide* offer therefor, then" the defendant was to communicate such offer to the plaintiff, who was to have ten days in which to "buy said patents and business" on the terms so offered, and, if he did so, he was given the right to "credit his fifteen one-hundredths interest in the purchase price and make payment for the balance of the purchase price at such times and in such manner as" might be agreed upon. In case he did not purchase, the defendant might sell to the person who had made the offer, "accounting to the [plaintiff] for his fifteen one-hundredths part of the proceeds of such sale as aforesaid. But in the event that the person making such offer" did not purchase, then no sale could be made "of said patents and business by the parties of the second part until a new offer" should "have again been submitted to the party of the first part and rejected by him in like manner as before." *Held*, that the words "interest in and to said patent," as used in the contract, meant a limited property right arising under and defined in the contract, which was less than absolute ownership, and that the plaintiff was not entitled at the termination of the contract to an assignment of the title to any part of the patent.

BILL IN EQUITY, filed in the Superior Court on August 9, 1909, seeking to compel the defendants to convey to the plaintiff a certain interest in a patent and in the profits from the manufacture of the patented machine, in accordance with what the plaintiff alleged to be the meaning of a contract between the parties, which is described in the opinion; also a

CROSS BILL in which the defendants sought an accounting from the plaintiff under the terms of the contract.

The case was heard by *Richardson*, J., and a commissioner was appointed under Equity Rule 35 to take the evidence.

The trial judge filed the following memorandum of his findings:

"1. I find that the contract . . . was executed after a full examination and knowledge of all its terms and stipulations by all parties and their counsel.

"2. I find that the license mentioned in said contract was terminated on July 1, 1909, and the defendants did not, at least for some time after that, express to the plaintiff a desire to have the license renewed or continued; and there was no agreement that the license should be renewed or that the business should go on as it had gone on from July 1, 1909; and there was no evidence of a purchase by the plaintiff or by anybody else

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of the letters patent as was contemplated there might be in the last part of Article VIII. of the contract. A large portion of the things, which under Article X. of the said contract the plaintiff was to turn over to the defendants, was delivered to the defendants or upon their order and in accordance with their direction soon after July 1, 1909. . . . If there were a few things relating to 'machines' that were not delivered, it does not appear that the defendants made any complaint to the plaintiff, that they had not been delivered, down to the time of the hearing and down to the time of the hearing no demand was made for any other of the things relating to machines which were not delivered.

"3. Upon all the evidence I think the plaintiff is entitled to such 'transfers, papers and instruments as will vest in him upon and after July 1, 1909, 15/100 interest in and to said Letters Patent,' and in the other patents and inventions described in . . . the bill; and also is entitled to the performance of all other of the defendants' stipulations or promises in the first part of Article VIII.

"4. The defendants on their cross bill are entitled to an accounting of what of anything is due from the plaintiff to them for and during the period of, the license down to July 1, 1909."

A final decree was entered in accordance with the foregoing memorandum, except that no mention was made therein as to an accounting by the plaintiff to the defendants. The defendants appealed.

The facts are stated in the opinion.

G. W. Anderson, for the defendants.

W. Quinby, for the plaintiff.

RUGG, J. This is a suit in equity brought to enforce specifically certain terms of a contract touching letters patent. A cross bill was brought by the defendants asking affirmative relief.

The defendants, being owners of a patent issued by the United States for certain "machines" and "rolls," entered into an agreement with the plaintiff by which the latter was granted an exclusive license to manufacture and sell the patented devices for a term of five years. Article VII. of the contract regulated in detail the way in which the accounts of the plaintiff while

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exercising the rights of manufacture and sale should be kept, what should be treated as manufacturing costs, and how the profits of the business should be computed, and in what proportion and at what times the part to which the defendants were entitled should be paid to them. The main difficulty arises in interpreting Article VIII. of the contract, which, so far as material, is as follows: "At the expiration of said licenses and of this contract, namely, on July 1, 1909, if the parties of the second part [the defendants] do not then desire to renew the said contract for a further term, they shall deliver such transfers, papers and instruments as will vest in the party of the first part [the plaintiff] from and after said July 1, 1909, fifteen-one-hundredths (15/100) interest in and to said patent . . . and also fifteen-one-hundredths (15/100) interest in and to all the profits arising from business in machines during the life . . . of said patents . . . and also twenty-one-hundredths (20/100) interest in and to all the profits arising from the sale of rolls, spare parts and supplies furnished to said machines or protected in any manner by the patents. . . . Profits within the meaning of the foregoing provisions shall mean the differences between the manufacturing cost and the amount of the receipts in each instance as hereinbefore defined in Article VII., and all the provisions of that article shall apply to the parties hereto *mutatis mutandis*. And in the event the parties of the second part desire to sell said patent or patents and business done under them, and in the event that they obtain a *bona fide* offer therefor, then the same shall be by them forthwith communicated to the party of the first part, and after the receipt of such communication by the party of the first part he shall have ten (10) days in which to determine whether he will buy said patents and business at said offer. The party of the first part may, if he is the purchaser of said patents and business, credit his fifteen-one-hundredths (15/100) interest in the purchase price and make payment for the balance of the purchase price at such times and in such manner as may be agreed upon. In the event the parties of the second part should not receive from the party of the first part notice of his intention to buy within ten days, then the parties of the second part may sell the same to the person making such offer for the amount of such offer, and

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accounting to the party of the first part for his fifteen-one-hundredths (15/100) part of the proceeds of such sale as aforesaid. But in the event that the person making such offer does not purchase, then no sale can be made of said patents and business by the parties of the second part until a new offer shall have again been submitted to the party of the first part and rejected by him in like manner as before."

A right of renewal was given to the patentees. The judge of the Superior Court found that there was no renewal of the contract, and that it terminated on July 1, 1909. While his finding is not very clear as to whether the terms of Article X.* of the contract have been complied with by the plaintiff, we understand it to mean that it has been substantially performed, and that if in small particulars it has not been, specific performance has been waived by the conduct of the defendants. These conclusions of fact must stand as final under the familiar rule that they will not be disturbed unless plainly wrong. A perusal of the evidence discloses no ground for us to say that they should be set aside.

The pivotal controversy relates to the signification to be attributed to the word "interest" as used in Article VIII. of the contract, which required to be transferred to the plaintiff a fractional "interest in and to said patent." The word "interest" has not become a term of art in patent law, and has no technical meaning. It is elastic in use, and may convey in different connections a considerable variety of ideas. Excluding those which do not relate to a pecuniary concern in property, it has been held to be more comprehensive than title, and to be synonymous with it, to express less than title, and to be distinguishable from it, and to be broad enough to embrace all claims of every description, to include every right in the nature of property below title, and to refer to equitable rather than legal estates, the somewhat diverse meanings depending upon the relation in

* Article X of the contract was as follows: "At the expiration of this contract or of any renewal thereof, the party of the first part shall deliver without charge to the parties of the second part a list of the machines and their location, so far as known to the party of the first part, and also deliver all drawings, patterns, jigs, special tools, and the like, used by the party of the first part in and which would be naturally used in the manufacture of said machines."

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which it is found and the subject to which it refers. It would not be profitable to review the cases. The end to be reached is an ascertainment of what this contract means in view of the relations of the parties, the matter about which they were dealing, the particular language employed, the other provisions of the contract, and the practical results likely to flow from the several constructions contended for. The contract recites that the parties are the owners of a patent who desired to enlarge the business of manufacturing and selling the patented articles, on one side, and a manufacturer possessed of capital, plant and organization of which the patentees desire to avail themselves, on the other. The relations were to continue for five years with a right of renewal reserved to the patentees alone. The plaintiff during the term of the contract had exclusive rights of manufacture and sale. The subject of the contract on which all its provisions hinged was a patent. This is a property right of a peculiar nature, with attributes which differentiate it from all other classes of property. The distinguishing characteristics of ownership in a patent are that in this country the number of such owners may be unlimited, each freely and without the consent of his co-owners may use the protected invention, without responsibility to them for profits, grant licenses for such use, and in his own name recover royalties or profits therefor, and assign and transfer his share to a purchaser, who would be free from liability for infringement to the other owners. The nature of a patent is such that joint owners in it "are at the mercy of each other." *McDuffee* v. *Hestonville Mantua & Fairmount Passenger Railway*, 162 Fed. Rep. 36, 39. *Steers* v. *Rogers*, [1893] A. C. 232. *Dunham* v. *Indianapolis & St. Louis Railroad*, 7 Biss. 223. *Mathers* v. *Green*, L. R. 1 Ch. 29. *Vose* v. *Singer*, 4 Allen, 226.

The word "interest" occurs in Article VIII. subsequently to the phrase above quoted, and there relates to the profits in which the plaintiff was to share arising from the business to be carried on during the life of the patents by the defendants after the expiration of the contract. In these connections, obviously it can refer only to an executory obligation on the part of the defendants to account for profits as they arise, — to a future potentiality and not to a present and existing title. It is natural

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that a word repeated several times in the same paragraph should have the same meaning in each instance. Moreover, these profits are defined as meaning the same as in Article VII., all the provisions of which are to apply to the relations between the parties, springing into existence after the expiration of the contract "*mutatis mutandis.*" These two words mean necessary changes in details to conform to a single vital alteration. Together with reference to this clause of definition, they speak strongly of a reversal of the relative positions of the parties as to the real purpose of the contract, which was to continue the same in other respects. The chief end of the contract was to make money for all concerned by vesting the exclusive right of manufacture and sale under the monopoly of the patent in one party. During the term of the contract, the plaintiff was to manufacture and sell exclusively and share the profits, calculated according to the rule established by the agreement, with the defendants. *Mutatis mutandis* in this connection conveys the thought that after the expiration of the time limited in the contract, the defendants were to have the exclusive rights of manufacture and sale, subject to a similar obligation to share the profits, calculated in the same way, with the plaintiff. It hardly seems probable that the parties would have been so careful to provide for an accounting by the patentees, who would be compelled to start anew in business after an interruption of five years, if the plaintiff, who is by the contract described as possessed of "capital, plant and organization" had such rights of title to the patent as would enable him to continue the business established under the license without material interruption.

The terms as to the sale point to ownership of the entire patent by the defendants. Their desire "to sell said patent" is made the turning point of a sale. If the plaintiff exercises his option to purchase, he is authorized to credit himself with his fractional interest in the price, but if he does not, the defendants are authorized to "sell the same," that is, the patents, and not eighty-five one-hundredths of them, and to receive the entire purchase price, with obligation only to account to the plaintiff for his part. This power implies entirety of title. The practical effect of the interpretation contended for by the plaintiff renders the patent itself of little or no value to the weaker

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party. The distinguishing characteristic of a patent is that it enables the holder to prevent everybody else from manufacturing the protected article, except upon terms imposed by the patentee. As between hostile co-owners, the one of larger resources has a great advantage, but the means for conserving the special benefits which the patent confers no longer exist. An interpretation of a contract which would lead to this result would not ordinarily be given unless the language plainly required it. The words of the agreement before us bear no such indication. On the contrary, they show an intent to maintain the integrity of the patent and an employment of its protection in the use which would yield its largest value to all those having a right to share in its profits. These considerations all lead to the conclusion that under the contract the plaintiff is not entitled to a present assignment of the title to any part of the patent. "Interest" as used in this agreement is something different from title. It means a limited property right arising under and defined in the contract, less than an absolute ownership. He is entitled to his fractional part in the proceeds of a sale when one is made, to a preferential option to buy at the same price offered by any outsider crediting his interest toward such purchase price, and to a share in the profits, as defined by the contract, of the business of manufacture and sale based on the patent while carried on by the defendants. He is entitled to a decree to that effect.

The decree in favor of the plaintiff is reversed. Upon their cross bill, the defendants are entitled to an accounting under the contract prior to July 1, 1909, and to a general accounting for all use made by the plaintiff of the patents since July 1, 1909.

So ordered.

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DAVID A. ELLIS & others, trustees, *vs.* JOHN G. SMALL & others.

Suffolk. January 26, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Equity Jurisdiction, Specific performance, Trust. *Landlord and Tenant. Covenant.*

In a suit in equity by the trustee in bankruptcy of a business corporation against an individual defendant who had caused the corporation to be formed to carry on the business formerly conducted by him personally, to compel the specific performance by the defendant of an oral promise to assign to the corporation a lease held by him of the premises in which the business of the corporation had been carried on ever since its formation, it appeared that the lease contained a covenant by the defendant as lessee not to assign or underlet the premises except with the written consent of the lessor, and there was no evidence that the lessor had given or would give his consent to an assignment and he was not a party to the suit. The lease also provided that if the lessee or his representatives or assigns failed to perform any covenant, or if the lessee should be declared a bankrupt or insolvent or an assignment of his property should be made for the benefit of creditors, the lessor might enter and expel the lessee. *Held*, that, assuming that there was a consideration for the defendant's oral agreement to assign the lease, and that there had been such a part performance as to take the case out of the statute of frauds, and assuming also that the conditions on which the defendant promised to assign the lease had been performed, specific performance could not be decreed, because the defendant should not be ordered to violate his covenant, and, even if he should be ordered to violate it, the result would be to give the lessor an immediate right of entry which would deprive the plaintiff of the lease; and, moreover, to order an assignment of the lease to the trustee in bankruptcy of the corporation would violate the spirit and intent of the provision of the lease giving the lessor the right of re-entry if the lessee became bankrupt or insolvent or made an assignment for the benefit of creditors.

In a suit in equity by the trustee in bankruptcy of a business corporation against an individual defendant who had caused the corporation to be formed to carry on a business formerly conducted by him personally, to compel the specific performance by the defendant of an oral promise to assign to the corporation a lease of the premises in which the business of the corporation had been carried on ever since its formation, where the bill also contains a prayer that the defendant shall be ordered to hold the lease in trust for the corporation or for the plaintiff, if a decree for specific performance cannot be granted because it would compel the defendant to violate a covenant of the lease and would be nugatory and inequitable, the same reasons prevent the granting of a decree that the defendant shall hold the lease as trustee for the corporation or the plaintiff, because such a decree would mean that in equity and good conscience the plaintiff is entitled to a transfer of the lease, which the denial of specific performance decides not to be the case.

MORTON, J. This is a bill in equity by the trustees in bankruptcy of the J. G. Small Company, a Massachusetts corpora-

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tion, to compel the assignment to them by the defendant Small of a lease of certain premises on Washington Street in Boston, where the corporation was carrying on business when it was adjudged bankrupt, and where it had been carrying on business since its incorporation a little more than a year before. The bill also contained a prayer that the defendant Small be decreed to hold the lease in trust for the corporation or for the plaintiffs as receivers of its property. The case was sent to a master and comes here from the Superior Court * on his report and the defendants' exceptions thereto, such decree to be entered as justice and equity may require.

Before 1909 the defendant Small was carrying on business on the premises in question under the name of J. G. Small and Company, and had a written lease which expired on December 31, 1908. In January, 1909, he procured from the owners a new lease for five years from January 1, 1909. In April, 1909, the business carried on by the defendant Small was incorporated by him under the name of the J. G. Small Company, with a capital of $50,000, and all of the assets of the business except the lease were conveyed by him to the corporation. The corporation occupied the premises as tenant at will under the defendant Small and the business was carried on as it had been before the corporation was formed.

In December, 1909, the defendants Brewer and Macauley and the defendant Small, and one Levett who had a nominal interest, entered into a written agreement whereby it was agreed that Small should transfer to Brewer and Macauley each one hundred and fifty shares of the capital stock of the corporation and that Brewer and Macauley should each thereupon pay into the treasury of the corporation $15,000 in cash. It was also agreed that Small should pay in $5,000 in cash which he did. Nothing was said in the written agreement about an assignment of the lease, and the master finds that the defendant Small had been requested by Brewer and Macauley to assign the lease and had refused before the written agreement was entered into. Shortly after the execution of the agreement Brewer and Macauley told the defendant Small that they would not carry out their contract

* The case was reserved by *Richardson*, J., for determination by this court.

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unless he would agree, amongst other things, to assign the lease to the corporation. The master finds that Small did thereupon orally agree to assign the lease. The corporation was at the time heavily in debt. After Small agreed to assign the lease Brewer proceeded to pay in the $15,000 though not exactly as agreed. Macauley paid in $5,000 and no more, though repeatedly requested to do so by Small. Stock to the amount of $20,000 was issued to Brewer and Macauley and they with Small and Levett, who had one share, were elected and constituted the board of directors. The master finds that Macauley's failure to pay in the balance of $10,000 pursuant to his agreement was a material breach of his contract and seriously embarrassed the corporation. Of the money paid in the master finds that from $12,000 to $14,000 was expended by the corporation in permanent improvements on the premises and in putting in fixtures in reliance upon the defendant Small's oral promise to assign the lease. The corporation was adjudged bankrupt in August, 1910. Before that, the defendant Small had refused to carry out his oral agreement to assign the lease and had been advised not to execute a contemplated trust agreement in regard to the lease until the whole $30,000 was paid in, which, as already observed, never was done. The lease contains a covenant on the part of the lessee not to assign or underlet except with the written consent of the lessor. It also provides that if the lessee or his representatives or assigns fail or neglect to perform any of the covenants on his part to be performed, or if the lessee shall be declared bankrupt or insolvent or if any assignment of his property shall be made for the benefit of creditors, then, in either case, the lessors may without further notice or demand enter and expel the lessee and repossess themselves of the premises as of their former estate. The master finds that there is no evidence that the lessor has given or will give his consent to an assignment, and he is not a party to these proceedings.

We assume in favor of the plaintiffs, but without so deciding, that there was sufficient consideration for Small's promise to assign the lease, and that there has been such part performance as to take the case out of the statute of frauds. But we think that the covenant not to assign except with the written consent of the lessor, which is wanting, constitutes an insuperable objec-

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tion to granting the relief sought. It is possible that Macauley's failure to pay in the balance of $10,000 would also constitute an insuperable objection.

An assignment by the defendant Small would be a violation of the covenant and would give the lessor an immediate right of re-entry. There is nothing to show that the lessor has waived his right of re-entry. It would be futile, therefore, to compel the defendant to assign the lease. Under such circumstances equity will not enforce specific performance. *Gannett* v. *Albree*, 103 Mass. 372. *Squire* v. *Learned*, 196 Mass. 134, 136. *Thompson* v. *Guyon*, 5 Sim. 65. *Gregory* v. *Wilson*, 9 Hare, 683. *Lewis* v. *Bond*, 18 Beav. 85. *Hurlbut* v. *Kantzler*, 112 Ill. 482.

Moreover the lease provides that if the lessee becomes bankrupt or insolvent, or if an assignment of his property is made for the benefit of his creditors, the lessor may re-enter. It would violate the spirit and intent of these conditions to compel an assignment to the trustees in bankruptcy of a bankrupt corporation. The assignment when made would be an assignment by the lessee though made by order of court, and would be subject to the conditions of the lease. See *Shee* v. *Hale*, 13 Ves. 404. It would stand on a different footing from an assignment by operation of law, as to which see *Bemis* v. *Wilder*, 100 Mass. 416. The case is entirely different from a case where by reason of some infirmity in the title a party is unable to convey all that he has contracted to convey, but the other party to the contract is willing to accept partial performance with a proportionate reduction in the consideration. *Park* v. *Johnson*, 4 Allen, 259. In such a case the contract is enforced between the parties to it and there is no element of forfeiture involved. More analogous are the cases in which the holder of a liquor license has been required to transfer it to an assignee or purchaser subject to the possibility that the commissioners may issue a license to him. *In re Fisher*, 98 Fed. Rep. 89. *Fisher* v. *Cushman*, 103 Fed. Rep. 860. *In re McArdle*, 126 Fed. Rep. 442. But the conditions on which such licenses are issued are not at all like those contained in the lease in this case. If they were, we may fairly assume that the court would not have felt that it could compel a transfer. As it was, there being no conditions such as exist in the lease in the case at bar, and a practice having grown up on the part of

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the board of police commissioners of the city of Boston by which a license has there come to have a sort of pecuniary value attached to it, the court naturally took the view that if there was anything in the nature of property in the license, or anything which could be realized by means of it, the assignee should have the benefit of it. It should be noted that it has been held in this Commonwealth that a license is nothing more than a personal privilege with elements of pecuniary value in Boston in consequence of the practice aforesaid. *Tracy* v. *Ginzberg*, 189 Mass. 260.

What cannot be done directly by enforcing specific performance cannot be done, we think, indirectly by means of a decree requiring the defendant Small to hold as trustees for the plaintiffs' benefit. From the nature of the case the court, for reasons already stated, cannot treat that as done which should have been done. A decree that the defendant Small should hold the lease in trust for the plaintiffs would be in substance and effect a decree that in equity and good conscience the plaintiffs were entitled to a transfer notwithstanding the conditions of the lease were such that a transfer could not be made and would be plainly inconsistent with the denial of specific performance. The same reasons which prevent a decree for specific performance operate against a decree requiring the defendant Small to hold the lease in trust for the plaintiffs or for the corporation.

In view of the conclusion to which we have come on this branch of the case it is unnecessary to consider the effect of Macauley's failure to pay the balance of $10,000.

Bill dismissed.

D. A. Ellis, (*J. B. Jacobs* with him,) for the plaintiffs.

H. W. Ogden, (*E. H. Robinson* with him,) for the defendants.

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DINAH BUCKLEY, administratrix, *vs.* DOW PORTABLE ELECTRIC COMPANY.

Norfolk. March 7, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

Driving an automobile truck from a new factory back to an old factory, from which the driver's employer is moving, is not an act of superintendence, and if a workman of the same employer at his request is taken along, sitting on an empty basket, and is thrown out and killed owing to too great speed or careless driving, the administrator of the workman's estate cannot recover from the employer for the death of his intestate thus caused by the carelessness of a fellow workman.

TORT by the administratrix of George J. Buckley, under the employers' liability act, to recover damages for the conscious suffering and death of the plaintiff's intestate from injuries sustained on December 20, 1906, between three and four o'clock in the afternoon, when the intestate was employed by the defendant as a lumper or a man who did general work around the defendant's factory, with two counts, respectively for the conscious suffering and death of the intestate, alleged to have been caused by the negligence of a person in the service of the defendant who was entrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence. Writ dated March 14, 1907.

In the Superior Court the case was tried before *Sherman*, J. The facts shown by the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to instruct the jury that upon all the evidence the plaintiff was not entitled to recover under either count of the declaration, and to order a verdict for the defendant on the ground that there was no evidence to show that Alvah M. Dow, mentioned in the opinion, was a superintendent whose sole or principal duty was that of superintendence, or who was acting as superintendent, and upon the further ground that upon all the evidence Alvah

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M. Dow at the time of the accident was not engaged in superintendence or in acting as superintendent.

The judge refused to give these rulings, and submitted the case to the jury, who returned a verdict for the plaintiff, assessing damages on account of death in the sum of $5,000 on the second count, and allowing no damages for conscious suffering as alleged in the first count. The defendant alleged exceptions.

J. W. McAnarney, (*T. F. McAnarney* with him,) for the defendant.

E. W. Crawford, for the plaintiff.

RUGG, J. This is an action under the employer's liability act to recover for the death of the plaintiff's intestate, while at work for the defendant, alleged to have been caused by the negligence of Alvah M. Dow, a superintendent of the defendant. The only negligence relied upon was the careless operation and overspeeding of an automobile.

The circumstances of the accident were these: The defendant was moving from one factory to another, and for this purpose had used an automobile truck. The plaintiff's intestate being at the new factory and desiring to go to the old, asked Alvah M. Dow whether he was going over, and on receiving an affirmative reply said he would go along too. Dow assented. Four persons so far as appears without direction from anybody got on the car, although there were only two seats, and some baskets were in it, upon one of which the plaintiff's intestate seated himself. Dow drove the automobile. As it was passing rapidly around a curve on the journey to the old factory over a rough, bad place in the highway near a railroad track, one wheel struck a projecting water gate, the plaintiff's intestate was thrown out and received mortal injuries. Either the speed of the automobile or the failure to avoid obstructions in the way or both contributed to the accident. Assuming that Dow might have been found to be a superintendent within the meaning of the employers' liability act, the negligent act complained of must have been performed in the exercise of superintendence in order that the defendant may be liable. The driving of the car was not superintendence, but manual labor. Although requiring a considerable degree of skill, discretion and alertness, it involved no element of super-

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vision or overseeing of others. If the direction, which Dow gave to himself to run the machine from one factory to the other, be treated as an act of superintendence, the details of the execution of the order as to speed from moment to moment, precise course upon the roadway and avoidance of projections or other obstacles were necessarily within the control of the operator of the car in the performance of his duty as operator. The causal negligence was not in determining to take the automobile, but in the way and place in which it was run. This rested upon the independent personal volition of the driver. In doing this Dow was merely a fellow servant with the plaintiff's intestate, and not one in authority over him or anyone else. Under the law the defendant is not responsible in damages for this conduct so far as it affects a fellow laborer. The case falls within the class illustrated by *Sarrisin* v. *Slater & Sons*, 203 Mass. 258; *Brittain* v. *West End Street Railway*, 168 Mass. 10; *Riou* v. *Rockport Granite Co.* 171 Mass. 162; *Fleming* v. *Elston*, 171 Mass. 187; *Fitzgerald* v. *Boston & Albany Railroad*, 156 Mass. 293; *Whittaker* v. *Bent*, 167 Mass. 588; *McPhee* v. *New England Structural Co.* 188 Mass. 141, 144; *Hoffman* v. *Holt*, 186 Mass. 572, and *Joseph* v. *George C. Whitney Co.* 177 Mass. 176. *Mooney* v. *Benjamin F. Smith Co.* 205 Mass. 270, is distinguishable in its facts.

There appears to have been a full and fair trial and, as no ground of liability on the part of the defendant is shown, under the terms of the exceptions and St. 1909, c. 236, judgment is to be entered for the defendant.

So ordered.

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TIMOTHY C. BOURNE *vs.* WILLIAM P. WHITMAN.
MAY A. DAVIS *vs.* SAME.
TIMOTHY C. BOURNE *vs.* RICHARD P. WHITMAN.
MAY A. DAVIS *vs.* SAME.

Barnstable. March 9, 10, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, In use of highway, Law of road, In driving automobile, Violation of statute. *Practice, Civil*, Conduct of trial, Exceptions. *Law of the Road. Automobile. Agency*, Existence of relation. *Words*, "Riding with," "Accompanied by."

In an action for injuries caused by a collision of two automobiles when being driven upon a highway in opposite directions, the defendant asked for the following instruction: "If the jury find that at the time of the accident the defendant was driving on the right of the middle of the travelled part of the way, it is evidence of the exercise of due care on his part, and if the jury shall find that the plaintiff was driving his machine in an opposite direction and collided with the defendant, this is evidence that the plaintiff was acting in violation of R. L. c. 54, § 1, requiring him to drive to the right of the middle of the travelled part of the road, and unexplained indicates negligence on the part of the plaintiff." There was evidence to which this instruction was applicable, and there also was other evidence bearing upon the questions whether the plaintiff was in the exercise of due care and whether the defendant was negligent. The presiding judge refused to give the instruction. *Held*, that, although the instruction requested was a correct statement of the law and properly might have been given by the judge, yet, there having been other evidence in the case with which the request did not deal, the judge in his discretion was not bound to give the instruction in the form requested, because it selected evidential facts that might or might not be found by the jury and separated them from other parts of the evidence as the subject of a special instruction as to their effect.

St. 1908, c. 478, § 4, relating to the issuing by the highway commission of licenses for operating automobiles and motor cycles, as amended by St. 1909, c. 311, § 4, contains the following clause: "The provisions of this section shall not prevent the operation of automobiles by unlicensed persons if riding with or accompanied by a licensed chauffeur or operator." Section 5 of St. 1908, c. 478, declares that "Except as hereinafter provided" no person shall operate an automobile or motor cycle "unless specially licensed by the commission so to do." *Held*, that the failure of the Legislature to change the word "hereinafter" to "herein" in § 5, when making the above-quoted amendment to § 4, was a mere inadvertence, which does not affect the construction of the statute, and that under the authority of the amendment an unlicensed person may operate an automobile if riding with or accompanied by a licensed chauffeur or operator.

In the provision of St. 1908, c. 478, § 4, as amended by St. 1909, c. 311, § 4, that an unlicensed person may operate an automobile "if riding with or accompanied by a licensed chauffeur or operator," the words "riding with or accompanied by" contemplate a proximity sufficient to enable the licensed operator to maintain such supervision as may be necessary for safety and to render assistance.

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Under St. 1903, c. 473, § 4, as amended by St. 1905, c. 811, § 4, if an unlicensed person, who is operating an automobile "riding with or accompanied by a licensed chauffeur or operator," is a person of great skill and experience, whose license expired only the day before and who is expecting another license within a day or two, the supervision and reasonable proximity of the accompanying operator required by the statute are not so constant and so close as would be required if the unlicensed person were one learning to use an automobile, but, in order to establish the relation contemplated by the statute, both of the persons must have knowledge that the actual operator is unlicensed and that the licensed chauffeur or operator accompanying him is in a position to advise or assist him with reasonable promptness, if necessary.

Under the provisions of St. 1903, c. 473, § 5, that no person shall "operate an automobile or motor cycle upon any public highway or private way laid out under authority of statute unless licensed so to do under the provisions of this act," and that "No person shall operate an automobile or motor cycle for hire, unless specially licensed by the commission so to do," the operation of an automobile upon a highway without a license, although by other provisions of the statute it is made a punishable act, does not render the operator a trespasser on the highway.

In an action for injuries caused by a collision of automobiles when being driven upon a highway in opposite directions, the fact that the defendant was violating the provisions of St. 1903, c. 473, § 5, by operating an automobile upon a public highway without a license, is only evidence of his negligence in reference to his fitness to operate a car and to his skill in the actual management of it.

Explanation by KNOWLTON, C. J., of the different consequences resulting from a violation of St. 1903, c. 473, § 3, by operating an unregistered automobile upon a highway and a violation of § 5 of the same chapter by operating a registered automobile upon such highway without a license as a chauffeur or operator.

At the trial of an action against the owner of an automobile for injuries caused by its collision with another automobile in which the plaintiff was driving, it appeared that the defendant's automobile was being driven by the defendant's son, nineteen years of age. The defendant contended that at the time of the accident his son was not operating the automobile as his servant but on the son's own account. The weight of the testimony was that the son was using the automobile with his father's permission solely for his own purposes. There was evidence, however, that the son was employed regularly by his father as chauffeur, that he lived in his father's family, that persons whom he brought in the automobile to a dance on the evening of the accident and carried home again just before the accident, were in the presence of his father and his father's family at the dance, and that his father saw him start to take them home from the dance, and told him that he had better light his headlights. *Held*, that there was evidence for the jury on the question whether the son was representing his father in operating the automobile at the time of the accident.

FOUR ACTIONS OF TORT, by two plaintiffs severally against two defendants severally, for personal injuries and damage to an automobile of the plaintiff Bourne from being run into by an automobile belonging to the defendant William P. Whitman alleged to have been driven negligently by the defendant Richard P. Whitman, who was alleged to have been the agent and

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servant of the defendant William, on the main road from Bourne to Falmouth in that part of Falmouth called West Falmouth, near a bridge over the tracks of the New York, New Haven, and Hartford Railroad Company, on the evening of August 15, 1908. Writs dated December 7, 1908.

In the Superior Court the case was tried before *Bell*, J. The plaintiffs put in evidence four applications signed by the defendant Richard P. Whitman to the Massachusetts highway commissioners for a chauffeur's license, dated July 19, 1906, and in 1907, 1908, and 1909, in each of which in answer to the written questions in the applications, asking by whom he was employed and for whom he operated, the defendant Richard stated that he was employed by and operated for William P. Whitman. The plaintiffs also put in evidence two applications to the highway commissioners signed by the defendant William P. Whitman for the registration of the car involved in the accident, in the first of which dated August 24, 1907, William P. Whitman stated that he employed Richard P. Whitman as chauffeur, and in the second of which dated March 23, 1908, he stated that he employed one Lemuel W. Davis as chauffeur. The statements of facts in all of the applications were sworn to.

At the time of the accident, William P. Whitman's car was legally registered by the highway commissioners under a registration dated March 17, 1908.

The plaintiffs also put in evidence the records of the Massachusetts highway commissioners showing that the chauffeur's license issued to Richard P. Whitman expired by its own limitation on the day before the accident, to wit, on August 14, 1908, and that upon the day of the accident, August 15, 1908, Richard P. Whitman held no license to drive an automobile.

The defendants put in evidence the application of Richard P. Whitman to the highway commissioners dated and filed August 13, 1908, for a renewal of his license as a chauffeur, upon which a license was issued to him on August 17, 1908.

The plaintiffs offered evidence tending to show that on the evening of the accident they had been to Onset Bay and were returning by the State highway leading from Buzzards Bay through Megansett and North Falmouth to Falmouth, that the headlights and side lamps of their car were lighted properly and

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burning; that as they approached the place of the accident, going in a southerly direction, the highway ascended a grade and turned to the left across a bridge over the railroad track; that, at a distance approximately three hundred feet from the place of the accident, Bourne, who was driving the car, reduced its speed to approximately ten miles an hour and continued at that rate up to the time of the collision; that for three hundred feet before the collision and at the time of the collision he had been driving with his left wheels in the centre of the travelled part of the highway in the direction in which he was going; that as he approached the curve he sounded his horn and both plaintiffs were looking and watching ahead; that suddenly the car of the defendants came around the curve at a very high rate of speed; that the search lights were not lighted but side lamps were lighted and that the car came in contact with the left hand front end of the plaintiff's car. The force of the collision threw both plaintiffs out of the car and caused the personal injuries and the damage to the car complained of.

The defendants introduced evidence that William P. Whitman was a resident of Brockton, but that at the time of the accident he was living at his summer home in North Falmouth; that on the night of the accident the defendant Richard P. Whitman was desirous of attending a dance which was to be held at Megansett, a village of Falmouth, and wished to take with him three friends who lived at Falmouth Heights, another village of Falmouth, some distance south of Falmouth Centre and several miles from Megansett; that at about seven o'clock on the night of the accident the defendant Richard P. Whitman asked his father William P. Whitman whether he could take the car, as he wanted to go to Falmouth to get some of his friends to take them to a dance at Megansett, and that the elder Whitman told him he could take it; that the defendant Richard took the car and took with him Dr. Harold O. Hunt and Harold O. Fraser, two other friends of his, and carried them from North Falmouth to Falmouth Centre, leaving them there, and agreed to get them later in the evening after the dance and return with them to North Falmouth; that after leaving Hunt and Fraser, he continued on to Falmouth Heights, got his three friends, and returned by the same route through Falmouth and attended

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the dance at Megansett; that after the dance, at about 10.30 o'clock, William P. Whitman in front of the dance hall at Megansett saw Richard, who was about to return with his three friends to Falmouth Heights; that at that time the headlights of the car were not lighted and the elder Whitman told Richard that he had better light his headlights; that the elder Whitman did not see either the car or his son again until after the accident; that after leaving the dance Richard carried his three friends to Falmouth Heights and left them there, returning to Falmouth Centre alone where he stopped and took Dr. Harold O. Hunt and Harold O. Fraser into the car and continued toward North Falmouth; that it was a bright moonlight night with the moon nearly full; that the headlights were not lighted because the water connection with the generator was broken and they could not be lighted; that the side lights were lighted; that they proceeded in a northerly direction and went about a mile before reaching the bridge near which the accident occurred; that the defendant Richard was driving; that Harold O. Fraser sat beside him at his left and Dr. Hunt sat in the tonneau of the car, leaning forward between the other two men; that after leaving Falmouth and before reaching the bridge the three men were talking together and eating candy; that as they approached the bridge the speed of the car was about twenty miles per hour; that the defendant blew his horn three or four times; that upon reaching the southerly side of the bridge the defendant Richard shut off his power and coasted across the bridge; that his right hand wheels on reaching the bridge were within six feet of the fence at the side of the road on his right side; that as he crossed the bridge his car gradually drew nearer to the fence, and when he left the northerly side of the bridge his right wheels were within four feet of the fence on his right hand side; that his speed on leaving the bridge was approximately ten or twelve miles an hour; that after leaving the bridge the road curved to the right and his car continued to draw nearer to the right hand side of the road; that, on rounding the curve and about twenty-five or thirty feet from the bridge, all three who were in the defendant's car saw the plaintiff's car coming towards them at a distance of about thirty or forty feet; that there were no lights lighted on the plaintiff's car; that instantly the defendant

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Richard "hollered at" the plaintiffs and applied both his foot brakes and emergency brake and locked the rear wheels of his car; that this caused the car to come nearly to a standstill; that the plaintiffs were approaching them at a speed of from twenty to thirty miles per hour and were almost directly in front of the defendant's car, the plaintiff Bourne being on Bourne's extreme left hand side of the road; that Bourne suddenly turned his car to his right, but was too near to avoid a collision; that the left hand frame of Bourne's car struck the radiator and left hand frame of the defendant's car a glancing blow, drove the radiator back about four inches on that side, broke off the end of the frame and demolished the left hand front wheel; that the defendant's car, when struck, tipped over toward the fence on its right hand side and the side iron which holds the top in place struck the fence and was bent; that the right hand rear wheel of the defendant's car was crushed, as the wheels were locked and could not be moved backwards; that the force of the impact threw both the plaintiffs forward and out of their car and caused the rear end of their car to slew toward the middle of the road, leaving the front of the plaintiff's car within three or four feet of the front of the defendant's car.

The defendants, in justification of the action of Richard P. Whitman in operating the car, offered to prove that at the time of the accident Dr. Harold O. Hunt, who was riding with and accompanying Richard P. Whitman, was the holder of an operator's license, and had it in his possession, it having been duly issued by the Massachusetts highway commissioners, empowering him to operate an automobile upon the highways, and the defendants offered also the record of the highway commission showing that the license had never been suspended or revoked by the commission and at the time of the accident was in full force and effect, contending that the defendant Richard, not being a person who had been licensed and whose license was not then in force because of revocation or suspension for cause, had, by virtue of the license held by Hunt, a legal right to operate the automobile upon the highway.

Upon objection by the plaintiffs, the judge refused to allow the introduction of this evidence and ruled that the presence of Hunt in the automobile with the defendant Richard P. Whit-

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man at the time of the accident, notwithstanding the fact that Hunt possessed a license to operate an automobile, did not justify the defendant Richard P. Whitman in operating the automobile upon the highway at the time of the accident. The defendants excepted.

The defendant Richard P. Whitman, on his cross-examination, admitted filling out in his own handwriting and signing the application to the highway commissioners for a license. The date of this application was August 13, 1908. In answer to the question, "Are you operating for some other person?" he wrote in his own handwriting, "My father, William P. Whitman." "Q. What is your employer's name?" "A. William P. Whitman, 1362 Main Street, Brockton." The witness continued, that he drove for his father in the summer, but not for hire; that he did drive for him every summer that he was at home; that he took care of the automobile, and that there was nobody else who drove for his father in the summer except the witness; that his father did not drive his own car, but that he, the witness, was the driver. In his application of August 13, 1908, he said that he had driven the car forty thousand miles, and that in 1908 he was nineteen years old. He went to school each year and drove his automobile only during the summer; it had taken him four or five summers to drive forty thousand miles. He had had a license in 1905, 1906, 1907, and to August, 1908. He had been driving for his father since 1905, and during the summer was his father's regular driver and the only one he had. He said that every time he took the machine out, unless accompanied by his mother, he asked his father's permission.

The defendant also introduced the testimony of William P. Whitman, the father, as follows: The witness said that he owned the car which Richard was driving; that some time at Megansett on the day or night of August 15 his son had a talk with him about using the car. His son asked him whether he could take the car, and said that he wanted to go to Falmouth Heights and meet some friends and bring them to a dance at Megansett. The witness told him he could take it; the witness met him later with his friends at Megansett at 10.30 at the Megansett Casino and spoke with him; saw him start to take his friends

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back to Falmouth Heights and told him that he had better light his headlights. On cross-examination the witness testified that he was a resident of Brockton and had been engaged in business there for a number of years in the manufacture of shoes. There was evidence upon which the jury could find that William P. Whitman was a successful business man with a large interest in the company of which he was president; that Richard P. Whitman, the son, at the time of the accident was a minor and was about to enter Dartmouth College.

At the close of all the evidence, the defendant William P. Whitman asked the judge to rule that there was no evidence to go to the jury that at the time and place of the accident the defendant Richard P. Whitman was acting as his, William's, agent and servant, but that all the evidence in the case showed that Richard was using the automobile upon his own affairs, and asked the judge to order a verdict for the defendant William P. Whitman in both cases against him. The judge refused so to rule, stating that he believed this to be a question of fact which must be submitted to the jury. The defendant William P. Whitman excepted.

The plaintiffs asked the judge to give the following instructions:

1. "Richard P. Whitman, at the time of the accident, was operating his automobile without license and contrary to law, and the possession of a license by another person riding with him affords him no justification."

2. "Richard P. Whitman at the time of the accident was a trespasser upon the highway and had no legal right then and there to operate a car."

The judge gave these instructions to the jury, and the defendants excepted.

The defendants, among other requests, asked the judge to instruct the jury as follows: "If the jury find that at the time of the accident the defendant was driving on the right of the middle of the travelled part of the way, it is evidence of the exercise of due care on his part, and if the jury shall find that the plaintiff Bourne was driving his machine in an opposite direction and collided with the defendant, this is evidence that the plaintiff was acting in violation of R. L. c. 54, § 1, requiring

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him to drive to the right of the middle of the travelled part of the road, and unexplained indicates negligence on the part of the plaintiff." The judge refused to give this instruction, and the defendants excepted.

The judge submitted the cases to the jury, who at first returned a verdict for Bourne against William P. Whitman in the sum of $1,000 and for Davis against the same defendant in the sum of $100. In response to an inquiry of the judge, the jury said that they had not considered the cases against Richard P. Whitman. The judge then instructed the jury to retire again and to consider the cases against Richard P. Whitman as if there were no question of agency between Richard and William. The jury retired, and subsequently returned verdicts in the same amounts against Richard P. Whitman. The counsel on both sides were present and did not object to this course, it being agreed by the parties that, if the defendants' exceptions were overruled, the plaintiffs should elect as to which of the defendants they would proceed against. Both of the defendants alleged exceptions.

E. H. Fletcher, for the defendants.

C. F. Choate, Jr., for the plaintiffs.

KNOWLTON, C. J. These are actions to recover for injuries received from a collision between two automobiles, in one of which were the two plaintiffs. The accident happened late in the evening of August 15, 1908. The defendants asked the judge to instruct the jury as follows: "If the jury find that at the time of the accident the defendant was driving on the right of the middle of the travelled part of the way, it is evidence of the exercise of due care on his part, and if the jury shall find that the plaintiff Bourne was driving his machine in an opposite direction and collided with the defendant, this is evidence that the plaintiff was acting in violation of R. L. c. 54, § 1, requiring him to drive to the right of the middle of the travelled part of the road, and unexplained indicates negligence on the part of the plaintiff." There was evidence to which the request was applicable. There was also other evidence bearing upon the questions whether the plaintiffs were in the exercise of due care and whether the defendants were negligent. The request was in accordance with the law as laid down in *Perlstein* v. *American Express Co.* 177 Mass. 530, and in other cases, and it well

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might have been given. Perhaps the defendants properly might have gone further and have asked for an instruction that if the jury found the facts stated in the request, and also found that this violation of the statute was one of the direct and proximate causes of the collision, the plaintiff Bourne could not recover. *Newcomb* v. *Boston Protective Department*, 146 Mass. 596.

The plaintiffs' contention is that the judge was not bound to grant the request, because it asked for a ruling upon the effect of a particular part of the evidence, upon a question on which there was other testimony. It is true that the general subject of the plaintiff's care and the general subject of the defendant's negligence were involved in the two branches of the request, and there was other important testimony bearing upon each of these subjects. Applying the rule strictly, we are of opinion that the judge was not bound to comply with a request in this form, and to select evidential facts that might or might not be found by the jury, and separate them from other parts of the testimony as subjects for a special instruction upon their effect as evidence. *Hicks* v. *New York, New Haven & Hartford Railroad*, 164 Mass. 424 and cases cited.

One of the defendants was a father, who owned the automobile, and the other was his minor son nineteen years of age, who operated it as his chauffeur a part of each year, without compensation. One of the questions before the court was whether the son, Richard P. Whitman, was acting as his father's servant at the time of the accident, or was running the automobile for himself alone. He had had a license to operate an automobile as chauffeur for his father, William P. Whitman, in 1905, 1906, 1907 and 1908, up to August 14, 1908, when the license expired. He had made an application for another license which was issued to him on August 17. On August 15, 1908, the day of the accident, he was operating the machine without a license. The evidence tended to show that he was of large experience in this business and presumably thoroughly competent.

The defendants offered to prove that Dr. Harold O. Hunt, who was riding with Richard P. Whitman in the automobile, was the holder of an operator's license which he had with him at the time of the accident. This evidence was excluded and

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the judge ruled that the possession of a license by another person riding with him, afforded him no justification.

This brings us to the consideration of the language in the St. 1903, c. 473, § 4, as amended by the St. 1905, c. 311, § 4, as follows: "The provisions of this section shall not prevent the operation of automobiles by unlicensed persons if riding with or accompanied by a licensed chauffeur or operator." These words were originally in the St. 1903, c. 473, § 6, and this section was repealed by St. 1905, c. 311, § 7. In the repealing statute they were inserted in § 4 of the former act by an amendment of that act, but the word "hereinafter" in § 5 of St. 1903, c. 473, was not changed to "herein," as it should have been when the quoted language which previously had followed this word was now made to precede it by putting it in the earlier section. We are of opinion that the failure to make this change was a mere inadvertence, and that an unlicensed person may operate an automobile, if riding with or accompanied by a licensed chauffeur or operator, under the authority of St. 1903, c. 473, § 4, as amended by the St. 1905, c. 311, § 4.

The exclusion of the evidence and the ruling were at variance with the provision relied on by the defendants, if the language is taken literally and interpreted broadly. What is the meaning of the language? Evidently it was intended to provide an opportunity for persons to learn to use an automobile by running it under the supervision of a licensed person, and thus acquire skill by practice, without which one never could become skilful. It does not necessarily mean that the unlicensed operator shall be under the legal control of the licensed chauffeur, for the operator might be the owner of the automobile, and the chauffeur, a person hired by him to give instructions under his direction. But the language of the statute undoubtedly contemplated by the words, "riding with or accompanied by," proximity sufficient to enable the licensed operator to maintain such supervision as might be necessary for safety, and to render assistance, if need be, with reasonable promptness. In a case like the present, where the unlicensed operator was a person of skill and great experience, whose license had expired only the day before and who was expecting another license within a day or two, the supervision and reasonable proximity required by law would

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not be as close as in ordinary cases, but we are of opinion that the law contemplates at least knowledge on the part of both persons, of the existence of a relation like that of operator without a license, and licensed chauffeur or operator accompanying him, in a position to advise or assist with reasonable promptness, if necessary.

Neither the offer of proof nor the ruling shows plainly what construction was put upon the statute by the judge. He may have made his ruling on the ground that the defendants did not go far enough in their offer, to bring the case within the authority of the statute. As the burden of showing error is on the excepting party, we are inclined to hold that the offer did not go far enough and that no error is shown. But if the relation between the defendant Richard P. Whitman and Dr. Hunt was that contemplated by the statute and known to both of them, we are of opinion that the defendant was protected, even if it was not expected that any particular supervision would be required, and if they were not in such proximity as would be necessary for safety between a licensed chauffeur and an unlicensed operator just beginning to learn to manage a machine.

At the request of the plaintiffs, the judge instructed the jury that "Richard P. Whitman at the time of the accident was a trespasser upon the highway and had no legal right then and there to operate the car." Under the first part of the instruction the plaintiffs owed him no duty except to refrain from inflicting an injury upon him wantonly or recklessly. He had no right to put his car in the way of the plaintiffs, or to interfere with their use of the road in any part which they chose to occupy. The rights and duties of both parties were different from those of ordinary travellers. Presumably the instruction affected the decision, and if it was erroneous, there must be a new trial.

For the discussion of this part of the case, we assume that the defendant Richard received no protection from Dr. Hunt's license. He was then violating the law in not having obtained another license before running the car. What effect did this violation have upon the right of either party to recover, when there was an accidental collision between his car and that of another driver on the highway?

It is universally recognized that the violation of a criminal

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statute is evidence of negligence on the part of the violator, as to all consequences that the statute was intended to prevent. It has been said in a general way that such a violation is evidence of negligence of the violator, and it has sometimes been stated that this would show negligence, that can be availed of as a ground of recovery by one who suffers any kind of an injury from him while this illegality continues; but it is now settled that it is not even evidence of negligence, except in reference to matters to which the statute relates. *Davis* v. *John L. Whiting & Son Co.* 201 Mass. 91, 96 and cases cited. A criminal statute in the usual form is enacted for the benefit of the public. It creates a duty to the public. Every member of the public is covered by the protecting influence of the obligation. If one suffers injury as an individual, in his person or his property, by a neglect of this duty, he has a remedy, not because our general criminal laws are divided in their operation, creating one duty to the public and a separate duty to individuals; but because as one of the public in a peculiar situation, he suffers a special injury, different in kind from that of the public generally, from the neglect of the public duty. As was said by Mr. Justice Matthews in *Hayes* v. *Michigan Central Railroad*, 111 U. S. 228, 240: "The duty is due not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery." Intimations that there is a separate and distinct duty to individuals under general criminal laws, are not in accordance with sound reasoning or the weight of authority.

If we consider the effect of such a violation of law by a plaintiff, upon his right to recover, the principles that have been recognized are instructive. They were considered long ago in connection with our Sunday law. It has been established from early times that one who is violating a criminal law cannot recover for an injury to which his criminality was a directly contributing cause. It was early held in this State that one travelling in violation of the statutes as to the observance of the Lord's day, could not recover for an injury received while so travelling. *Smith* v. *Boston & Maine Railroad*, 120 Mass. 490 and cases cited. *Lyons* v. *Desotelle*, 124 Mass. 387. *Day* v.

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Highland Street Railway, 135 Mass. 113. *White* v. *Lang*, 128 Mass. 598. *McGrath* v. *Merwin*, 112 Mass. 467. These decisions on the Sunday law have been much criticised in the opinions of other courts and by writers of textbooks. *Broschart* v. *Tuttle*, 59 Conn. 1. *Sutton* v. *Wauwatosa*, 29 Wis. 21. *Baker* v. *Portland*, 58 Maine, 199. *Baldwin* v. *Barney*, 12 R. I. 392. *Johnson* v. *Irasburgh*, 47 Vt. 28. *Platz* v. *Cohoes*, 89 N. Y. 219. The ground of the criticism may be stated in a word, as a supposed failure to distinguish between criminality which is a cause, and criminality which is a mere condition of an injury for which recovery is sought. But this distinction is now thoroughly established in our law. *Newcomb* v. *Boston Protective Department*, 146 Mass. 596. *Farrell* v. *Sturtevant Co.* 194 Mass. 431, 434. *Moran* v. *Dickinson*, 204 Mass. 559, 562. The Sunday law, so called, has been repealed as to its effect as a bar to recovery in actions of tort showing a violation of it by the plaintiff. R. L. c. 98, § 17. The old case of *Gregg* v. *Wyman*, 4 Cush. 322, as to the effect of the Sunday law in barring a claim in trover against one who had driven a horse hired for service on Sunday to a different place from that agreed upon, was overruled by this court before the partial repeal of the Sunday law. *Hall* v. *Corcoran*, 107 Mass. 251. Other cases have been decided, in which it was held that illegality of the plaintiff was no bar to his recovery for an injury, unless his illegality was a cause directly contributing to the injury. *Damon* v. *Scituate*, 119 Mass. 66. *Smith* v. *Gardner*, 11 Gray, 418. *Dudley* v. *Northampton Street Railway*, 202 Mass. 443, 446. *Moran* v. *Dickinson*, 204 Mass. 559.

The only matter which seems to be left doubtful under our decisions in this class of cases, is what constitutes "illegality," which is sometimes a directly contributing cause of the injury. Some cases have been decided, which seem to imply that if there is an illegal element entering into a plaintiff's act or conduct, and this act or conduct directly contributes to his injury, he cannot recover, although the illegal element or the objectionable quality of the act had no tendency to produce the injury, and the consequences would have been the same under the other existing conditions, if the criminal element had been absent. In other cases the decision seems to turn upon whether the criminal

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element in the act or conduct, considered by itself alone, operated as a direct cause to produce a result that would not have been produced under the same conditions in other respects, if the criminal element had been absent. This latter seems to be the pivotal question in most cases decided in other States.

The fact that the number of punishable misdemeanors has multiplied many times in recent years, as the relations of men in business and society have grown complex with the increase of population, is a reason why the violation of a criminal statute of slight importance should not affect one's civil rights, except when this violation, viewed in reference to the element of criminality intended to be punished, has had a direct effect upon his cause of action. Our decisions seem to have been tending toward the adoption of such a rule. *Welch* v. *Wesson*, 6 Gray, 505. *Spofford* v. *Harlow*, 3 Allen, 176. *Steele* v. *Burkhardt*, 104 Mass. 59. *Damon* v. *Scituate*, 119 Mass. 66. *Hall* v. *Ripley*, 119 Mass. 135. *Dudley* v. *Northampton Street Railway*, 202 Mass. 443, 446. *Moran* v. *Dickinson*, 204 Mass. 559, 562. *Chase* v. *New York Central & Hudson River Railroad*, 208 Mass. 137, 157.

Under particular statutes, we are brought back to the question, what is the legal element which is the essence of the command or prohibition? In most cases, the effect of doing or failing to do that which the law forbids or requires under a penalty, when considered in reference to its relation to one's civil rights in collateral matters, ought to be limited pretty strictly. Take the case of driving without sleigh bells in violation of the law of the road. R. L. c. 54, § 3. *Kidder* v. *Dunstable*, 11 Gray, 342. *Counter* v. *Couch*, 8 Allen, 436, 437. The requirement of the law is that "No person shall travel on a bridge or way with a sleigh or sled drawn by a horse, unless there are at least three bells attached to some part of the harness." The wrong to be prevented is the failure to have bells while travelling in this way. The travelling in other respects is unobjectionable. The question arises whether the act should be deemed illegal as a whole, in reference to the rule that the courts will not aid one to obtain the fruits of his disobedience of law, or whether in this aspect its different qualities may be considered separately. It is possible to decide this question either way, but we think it is more consistent with justice and with

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the course of decision elsewhere, to hold that, in reference to the law of negligence and the rule as to rejection of causes of action that are founded on illegality, an act may be considered in its different aspects in its relation to the cause of action, and if only that part of it which is innocent affects the cause of action, the existence of an illegal element is immaterial. We do not think, under this statute, that one who drives in a sleigh without bells should be treated as a trespasser on the highway, although he is punishable criminally for the failure to have the bells attached to the harness, and is liable in damages to any member of the public who suffers a special injury by reason of this failure.

Consider the St. 1909, c. 514, § 74, which forbids, under a penalty, the regular operation of any elevator by a person under the age of sixteen years, and the regular operation of any rapidly running elevator by a person under the age of eighteen years. If a person under the prescribed age, while employed to operate an elevator, is injured through the negligence of the owner, in leaving it in an unsafe condition, shall his violation of the statute by entering this service before reaching the prescribed age, be treated as criminality, entering into every one of his acts in moving the elevator, so as to prevent his recovery for an injury from the joint effect of his employer's negligence and his own application of the power to raise or lower the elevator? We think it better to hold, if his age and the degree of his competency, which might depend in part upon his age, had no causal connection with the injury, that his criminality was not a direct cause of the injury. In other words, that the punishable element in the act is only disobedience as to age, and although his act in applying the power to the elevator which brought him in contact with the defect, is punishable, and in a sense illegal because of the existence of that element, in determining the relation of his conduct to the cause of action, to see whether the court will aid him in the prosecution of it, we ought to limit the illegality to that part of his conduct towards which the statute is particularly directed. We are to consider the specific thing at which the statute is aimed, and the immediate effect that it was intended directly and proximately to accomplish by its command or prohibition. A question of this kind arose in *Murphy* v. *Russell*, 202 Mass. 480, but it was not referred to in

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the opinion, as the case was decided on other grounds. Substantially, this question was decided in *Moran* v. *Dickinson*, 204 Mass. 559.

Take the provision in St. 1903, c. 473, § 5, that "No person shall operate an automobile or motor cycle for hire, unless specially licensed by the commission so to do," and the earlier provision in the same section that no person shall "operate an automobile or motor cycle upon any public highway or private way laid out under authority of statute unless licensed so to do under the provisions of this act." The operating of the automobile in itself is unobjectionable. The illegal element in the act is the failure to have a license. The purpose of the requirement of a license is to secure competency in the operator. If in any case the failure to have a license, looking to those conditions that ordinarily accompany the failure to have it, is a cause contributing directly to an injury, a violator of the law would be legally responsible to another person injured by the failure; or, if he is injured himself, would be precluded from recovery against another person who negligently contributed to the injury. But we are of opinion that his failure in that respect is only evidence of negligence in reference to his fitness to operate a car, and to his skill in the actual management of it, unless in the case of the plaintiff, it is shown to be a contributing cause to the injury sued for, in which case it is a bar to recovery. We think that the operation of a car without a license, while it is a punishable act, does not render the operator a trespasser on the highway, but that the illegal element in the act is only the failure to have a license while operating it, so that if the operation and movement contributed to the accident with which the want of a license had no connection, except as a mere condition, they would not preclude the operator as a plaintiff from recovery. If the illegal quality of the act had no tendency to cause the accident, the fact that the act is punishable because of the illegality, ought not to preclude one from recovery for harmful results to which, without negligence, the innocent features of the act alone contributed.

The other part of this statute, relative to the licensing of automobiles, has been construed differently. In *Dudley* v. *Northampton Street Railway*, 202 Mass. 443, because of the peculiar

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provisions of the statute and the dangers and evils that it was intended to prevent, it was decided, after much consideration, that the having of such a machine in operation on a street, without a license, was the very essence of the illegality, and that the illegality was inseparable from the movement of the automobile upon the street at any time, for a single foot; that in such movement the machine was an outlaw, and any person on the street as an occupant of the automobile, participating in the movement of it, was for the time being a trespasser. Some of us were disinclined to lay down the law so broadly, and the opinion of the court was not unanimous; but the doctrine has been repeatedly reaffirmed and is now the established law of the Commonwealth. *Feeley* v. *Melrose*, 205 Mass. 329. *Chase* v. *New York Central & Hudson River Railroad*, 208 Mass. 137, 158. The difference between this provision of the statute and that involved in the present case is in part one of form, but in connection with the form, it is still more the seeming purpose and intent of the Legislature as to permitting such machines upon the public ways without adequate means of identifying them and ascertaining their owner, together with the requirement that the machine itself, as a thing of power, shall have its own registration and legalization, the evidence of which it shall always carry with it. In the last of the cases cited is this language: "Under the decisions, the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. . . . The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law," etc.

We are of opinion that the law of these last cases should not be extended to the provision of the statute requiring every operator to have a personal license to operate the car. The jury should have been instructed that the defendant's failure to have a license was only evidence of his negligence as to the management of the car.

An important question at the trial was whether there was any evidence that Richard P. Whitman was operating the automobile as the servant of his father, at the time of the accident, or only on

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his own account. The weight of the testimony was that he was using it with his father's permission, solely for his own purposes. But we are of opinion that the circumstances that he was the regularly employed chauffeur of his father, that he lived in his father's family, that the persons whom he brought to the dance in the evening and carried home again just before the accident, were in the presence of his father and his family at the dance, that his father saw him start to take them home from the dance and told him he had better light his headlights, were proper for the consideration of the jury on the question whether he was representing his father in running the automobile at the time of the accident.

Exceptions sustained.

INHABITANTS OF WAKEFIELD *vs.* AMERICAN SURETY COMPANY OF NEW YORK.

Suffolk. November 10, 1910. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Practice, Civil, Auditor's report. *Municipal Corporations. Assignment. Waiver. Contract,* Novation. *Surety. Referee.*

Where an auditor to whom a case has been referred makes a finding in favor of one of the parties without reporting the evidence, and at the trial there is no evidence other than the auditor's report, the presiding judge must order a verdict in accordance with the auditor's report, which is made *prima facie* evidence by statute and stands uncontrolled. The same result is reached, where, in addition to the auditor's report, oral evidence is introduced at the trial, but such evidence does not tend to contradict the findings of the auditor.

In an action by a town against the surety on the bond of a contractor, an auditor to whom the case was referred found that the contractor abandoned the work to be done under his contract with the plaintiff and executed an instrument purporting to assign his contract to a certain corporation, that the contract with the plaintiff provided that it should not be assigned except with the previous consent of the plaintiff's board of sewer commissioners to be signified by indorsement on the contract, and that no previous assent to the instrument of assignment was given by indorsement upon the contract or in any manner. The auditor made a general finding for the plaintiff. At the trial of the case, in addition to the auditor's report, there was oral evidence. Several witnesses testified that, after the assignment, the original contractor had nothing to do with the work and that it was prosecuted wholly by the corporation, which purported to be the assignee, with the knowledge and without objection from the plaintiff's board of sewer commissioners, until at the end of six months the work was stopped

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by a notice from the plaintiff that it was not being prosecuted as required and that it would be completed by the plaintiff as provided in the contract. It was shown that there was considerable correspondence between the attorney for the plaintiff and the defendant, as surety on the original contractor's bond, in which the attorney repeatedly asserted that the plaintiff would not assent to the assignment, except upon certain conditions which never were complied with, and that the checks of the plaintiff in payment for the work done by the assignee all were made to the order of the original contractor and not to the assignee. There was no evidence of any express assent. The presiding judge ordered a verdict for the plaintiff. *Held*, that the knowledge by the plaintiff's officers of the assignment and of the work done by the assignee, under the circumstances shown and in view of the correspondence refusing such assent, was not evidence of the plaintiff's assent to the assignment of the contract, or of a waiver of the clause in the contract requiring such assent, or of a novation accepting the substitution of the assignee for the original contractor; that, therefore, there being no evidence to control or contradict the finding of the auditor, it was the duty of the judge to order a verdict for the plaintiff.

There is no obligation on the part of a town toward the surety upon a bond which was given by a contractor to ensure the faithful performance of his contract with the town, to keep the surety advised as to the condition of the work under the contract. The surety must protect his own interest by seeing that his principal performs the duty of which the surety has guaranteed the performance.

At the trial of an action by a town against the surety on a bond, which was given to the town by a contractor, the defendant contended that a payment made by the plaintiff to the contractor before his default was in advance of what was due to him under the contract, and that thereby the security of the surety was diminished. It appeared that the payment in question was made upon an approximate estimate by the plaintiff's chief engineer of the value of the work done at the time and that the engineer in making the approximate estimate, which he was required to make by the terms of the contract, certified in good faith to more work having been done than actually had been completed at the time, but that afterwards this was adjusted by deductions from subsequent estimates, so that the plaintiff in the end received full value for all payments made by it. An auditor found that there was no such payment in advance as was alleged by the defendant. *Held*, that the estimate of the engineer made under the contract in good faith was binding upon all the parties, and that the payment could not be considered as made in advance.

RUGG, J. This is an action brought for the breach of three bonds, each executed by Minahan and Costa, partners, as principals, and the defendant as surety, to secure faithful performance by said partners of contracts between them and the plaintiff to construct portions of its sewer system. The execution of the contracts and bonds was admitted. The case was sent to an auditor,* who found that the work to be done under the contract was abandoned by said partners, and that thereby there was a breach of the condition of each of the bonds. Each con-

* Samuel C. Bennett, Esquire.

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tract provided that the co-partners "will not assign . . . any portion of the said work, unless by the previous consent of the board [of sewer commissioners of the plaintiff], to be signified by indorsement on this agreement." The auditor found that no previous assent to any assignment was so given, and that no assent was indorsed on the contracts or given in any manner, and that the contracts were in fact assigned by the partners to the Conway Contracting Company. He also found that there had been no advance payment made by the plaintiff to the partners, and found generally for the plaintiff. The case then was tried with a jury in the Superior Court.* In addition to the auditor's report testimony was introduced from several witnesses to the effect that after the assignment of the contract neither of the partners was upon the work or had anything to do with it, but that it was prosecuted to the knowledge of and without objection by the sewer commissioners wholly by the assignee claiming under the assignment. After the assignee had been at work about six months, the work was stopped by notice to the effect that it was not being prosecuted as required, and that it would be completed by the plaintiff as provided in the contract. The work was so completed at a cost greater than the contract price. At the close of the evidence in the Superior Court, the defendant having admitted that proper notices of discontinuance of the work by Minahan and Costa and of claim for excess cost over contract price were sent and no question being raised as to the amount of the damages, a verdict was directed for the plaintiff.†

Since it was admitted that proper notice of discontinuance of the contract was given, a decisive point is whether there was an assignment of the contract by the partners assented to by the plaintiff. Upon this issue the auditor, as above stated, made definite findings in favor of the plaintiff to the effect that there

* Before *Lawton*, J.

† There was one count on each of the three bonds. The judge ordered the jury to find on each count for the plaintiff in the penal sum of the bond. He ordered judgment to be entered for $33,000, which was the total amount of the penal sums of the three bonds. Afterwards the judgments were amended so as to bear interest from the date of the writ, which was March 24, 1903. The judge ordered that execution should issue for the sum of $39,149.80, with interest from the date of the order, which was December 3, 1908.

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had been assignments which were never at any time assented to by the plaintiff. It is plain under the terms of the contract that an assignment without such assent constituted a breach of the contract. The auditor does not set out the facts or evidence upon which he based this finding. The effect of an auditor's report under such circumstances is stated in *Anderson* v. *Metropolitan Stock Exchange*, 191 Mass. 117, at 121, by the present Chief Justice as follows: "The auditor's report, finding generally for the plaintiff, and finding specially these facts, is *prima facie* evidence which requires a verdict for the plaintiff, unless there is other evidence, either in the report or outside of it, to control the findings." In substance, the same proposition was laid down in *Phillips* v. *Cornell*, 133 Mass. 546, in these words: "While the burden of proof is not shifted by the auditor's report, yet, as it makes out a *prima facie* case, it is incumbent on the other party to meet and control it, or it will be conclusive against him." To the same effect is *Fisher* v. *Doe*, 204 Mass. 34, 40. The result of these decisions is that where the auditor makes a simple finding in favor of one party without reporting the testimony, and there is no other evidence, a verdict should be directed in accordance with his finding. The case does not stand as it does upon uncontradicted evidence of witnesses, for there the jury may disbelieve the testimony. The statute has clothed an auditor's report with a special evidential character, which, in the absence of controlling evidence either stated in the report or put in outside the report, must be accepted by court and jury as final. Where only one conclusion is possible as matter of law, a verdict must be directed.

The question presented is whether there was any evidence to control the auditor's finding to the effect that the contracts had been assigned by the original contractors, and that at no time had such assignments been assented to by the plaintiff. If this finding stands there was a breach of the contract. The plaintiff's officers knew of the assignments, and they permitted work to proceed by the assignee. But there was a considerable correspondence between the attorney for the plaintiff and the defendant, in which the former repeatedly asserted that the town would not assent to the assignments except upon conditions which never have been complied with. The checks of the town

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in payment for work done all were made to the order of the original contractors, and none to the assignee. There was no evidence of any express assent. Disbelief of denials of facts which a party must prove is not the equivalent of affirmative testimony in support of those facts. *Lonergan* v. *Peck*, 136 Mass. 361. *Hyslop* v. *Boston & Maine Railroad*, 208 Mass. 362. Knowledge on the part of the officers of the plaintiff of the assignments and of the performance of the work by the assignee is all that remains. But this under the circumstances disclosed is not enough to show their assent to the assignment of the contracts, in the face of the correspondence refusing to assent. The highest effect which can be attributed to this fact is that, pending negotiations as to an assent to the assignments by the town, the assignee went on with the work. Whatever may have been the effect of the assignments as between the parties to them, they did not affect the rights of the plaintiff. *Pike* v. *Waltham*, 168 Mass. 581. *Fuller* v. *New York Fire Ins. Co.* 184 Mass. 12. For the same reasons there was no evidence of waiver of this clause of the contract, novation, or substitution of the assignee for the assignor. *Paris* v. *Hamburg-Bremen Fire Ins. Co.* 204 Mass. 90, 94. *Moore* v. *Duggan*, 179 Mass. 153, 158. *Stowell* v. *Gram*, 184 Mass. 562. *Illinois Car & Equipment Co.* v. *Linstroth Wagon Co.* 112 Fed. Rep. 737.

It becomes unnecessary to consider whether the auditor's finding as to abandonment was met in any way.

There was no obligation on the part of the plaintiff to keep the defendant as surety constantly advised as to the state of the work under the contract. The surety must protect his own interest to the extent of seeing that his principal performs the duty which he has guaranteed. *Watertown Fire Ins. Co.* v. *Simmons*, 131 Mass. 85. *Welch* v. *Walsh*, 177 Mass. 555.

The defendant contends that there was a payment made by the plaintiff to the original contractors in advance of any that was due under the contract, and that, its security being in some degree diminished thereby, it is discharged under the principle laid down in *Calvert* v. *London Dock Co.* 2 Keen, 638, and *Prairie State Bank* v. *United States*, 164 U. S. 227. The auditor found that there was no such advance, but reported some of the evidence upon this point. In addition to the auditor's re-

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port there was testimony from one Morgan, upon whose certificate as chief engineer of the plaintiff the payment now claimed to be an advance payment was made. The contract provided that on or before the tenth day of each month the engineer should make an approximate estimate of the value of the work done, and that upon this payments should be made. In one such estimate was included an item for excavation, and also an item for lumber used as sheeting in trenches under a clause in the contract which required payment for "all lumber in trench, used for sheeting and shoring left in place by order of the engineer." The amount certified had not been so left in place and all the excavation had not been completed by the units required by the contract, although a very large amount of work had been done. In subsequent estimates, deductions were made for these payments, so that ultimately the town received the value for all payments. The contract provided that the engineer should be the "referee, in all cases, to decide upon the amount, quality, acceptableness and fitness of the several kinds of work and materials which are to be paid for under this contract, and upon all questions which may arise relative to the fulfilment of the contract . . . and his estimates and decision shall be final and conclusive." The auditor found that the contested estimate was given by the engineer in good faith, and the defendant did not contend that he was actuated by bad faith. Under these circumstances such estimates were binding upon all the parties, and it cannot be contended that the payments based on them were made in advance. *Handy* v. *Bliss*, 204 Mass. 513, 520, and cases cited. *Loftus* v. *Jorjorian*, 194 Mass. 165. There was no issue of fact open in this regard not concluded by the auditor's report.

Several questions of evidence are raised. They all become immaterial in view of the ground upon which the decision is based. But it does not appear that any error of law was committed in respect of them.

Exceptions overruled.

J. P. Leahy, (*F. T. Leahy* with him,) for the defendant.

M. E. S. Clemons, for the plaintiff.

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GEORGE M. BRYNE *vs.* JAMES L. BRYNE.

Suffolk. March 10, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Bills and Notes. Contract, In writing. *Evidence,* Extrinsic affecting writings. *Words,* "Payable."

The following instrument, "Boston, Mass., September 3, 1903. Borrowed and received from George M. Bryne, five hundred and eighty-five dollars, payable April 1, 1904, with interest at six per cent. J. L. Bryne," is as matter of law a non-negotiable promissory note, and its maker, when sued on it as such, cannot be allowed to show that he intended it to be only a memorandum.

CONTRACT for $585 with interest at the rate of six per cent per annum from April 1, 1904. The declaration contained two counts, the first for the amount named, alleged to be a balance found to be due to the plaintiff by the parties on an accounting together, and the second as follows: "And the plaintiff says that the defendant made a promissory note payable to the plaintiff, a copy whereof is hereto annexed marked Exhibit A, and the plaintiff says that the defendant owes him thereon the amount of said note and interest thereon as therein stipulated when payment of the same was duly demanded from April 1, 1904, to the date of this writ." Writ in the Municipal Court of the City of Boston dated April 9, 1909.

The instrument, of which a copy was annexed to the second count and marked Exhibit A, was as follows:

"George M. Bryne
Contractor for public works
Room 802 Boston, Mass., September 3, 1903.
7 Water Street.

Borrowed and received from George M. Bryne, five hundred and eighty-five dollars, payable April 1, 1904, with interest at six per cent.

J. L. Bryne."

On appeal to the Superior Court the case was tried before *Sanderson,* J. It appeared that the plaintiff and the defendant were brothers, and each of them testified.

On the cross-examination of the plaintiff the defendant's counsel asked him in various forms whether the instrument de-

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clared upon in the second count was not given by the defendant to the plaintiff as a mere memorandum of the amount due and not as a note. These questions were objected to by the plaintiff's counsel, and were excluded by the judge. The defendant excepted. The defendant testified that the plaintiff asked him for a note; that he refused to give him a note, but said that he was willing to give a memorandum of the amount which the plaintiff claimed as due to him, and that he then wrote the paper and handed it to the plaintiff.

The defendant moved that the plaintiff should be required to elect on which count he would stand, and the plaintiff thereupon elected to stand on the second count of his declaration. The judge then ordered a verdict for the plaintiff for the amount of the alleged note with interest, amounting in all to $836. The defendant alleged exceptions.

The case was submitted on briefs.

J. E. Crowley & D. T. O'Connell, for the defendant.

J. T. Auerbach, H. S. MacPherson & J. B. Mahar, for the plaintiff.

MORTON, J. It is plain, we think, that the instrument declared on is a promissory note. It is not a negotiable promissory note and is not declared on as such. The word "payable" in the connection in which it occurs imports a promise by the maker to pay at the time fixed the sum named. The promise is not one implied by law from an acknowledgment of indebtedness, but is the maker's own promise. It is not contended that the other elements necessary to constitute a promissory note are not included in the instrument declared on. See *Kimball* v. *Huntington*, 10 Wend. 675; *Mitchell* v. *Rome Railroad*, 17 Ga. 574; *Carver* v. *Hayes*, 47 Maine, 257; *Pepoon* v. *Stagg*, 1 Nott. & McC. 102; *Cowan* v. *Hallack*, 9 Col. 572; *Waithman* v. *Elsee*, 1 C. & K. 35; *Richer* v. *Voyer*, L. R. 5 P. C. 461, 476. The question whether the instrument was or was not a promissory note was one of law for the court and evidence that it was intended by the defendant as a memorandum merely was rightly excluded.

Exceptions overruled with double costs and interest at twelve per cent.

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CHRISTOPHER G. PARNALL *vs.* WILLIAM A. PAINE & others.

Norfolk. March 13, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Conversion. Stockbrokers.

At the trial before a judge without a jury of an action, by the customer of a New York firm of stockbrokers against a Boston firm who did business for the New York firm under a contract with them, for conversion of shares of capital stock, a finding of the following facts was warranted from facts agreed upon: The customer on August 19 of a certain year ordered the New York firm to subscribe for the shares, the market for which was in Boston. The New York firm placed the order with the Boston firm and the Boston firm made the subscription for $4,000, paid for the shares in full and charged that amount to the New York firm, and the New York firm, receiving notice of the transaction, balanced their account with their customer by sending him a check for an amount which, with the stock thus subscribed for, was found to be due to him. The New York firm then demanded of the Boston firm that the shares of stock be transferred to their customer. The Boston firm, upon paying for the shares, had received temporary receipts, which later were to be surrendered and exchanged for stock certificates, but such exchange could not be made until September 8. By a custom of brokers, no charge was made for making such exchange. There were two accounts kept between the firms, one of dealings in Boston by the Boston firm for the New York firm and the other of dealings in New York by the New York firm for the Boston firm, and the accounts and the transactions referred to in them were intended to be dealt with independently, the two accounts to be considered together at the close of the transactions between the firms. On August 19 and immediately before and after that date, there was a substantial balance due to the New York firm on the account of the Boston firm's transactions for them. On the account as to the New York firm's transactions for the Boston firm, the New York firm had in their hands a large amount of property of the Boston firm as margins on New York stock transactions. On August 20 the New York firm paid the Boston firm $5,000 on account, which was understood to cover the transactions for the plaintiff. A few days later the New York firm failed and the Boston firm then sold the stock, which had been subscribed for on the plaintiff's behalf, and applied the proceeds toward what was due to them from the New York firm. *Held*, that there was evidence warranting a finding for the plaintiff, because findings were warranted that the defendants sold shares of stock which were fully paid for and belonged to the plaintiff, although there had been no formal transfer thereof to him and regular certificates could not be issued until later.

KNOWLTON, C. J. This case was heard by a judge * without a jury and there was a finding for the plaintiff upon a count for the conversion of five hundred shares of stock of the North Lake

* *Hardy*, J.

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Mining Company. It is reported upon the question whether there was any evidence to warrant the finding.

The plaintiff, a resident of Jackson, Michigan, had an account with A. O. Brown and Company, stock brokers, doing business in New York City, upon which there was a substantial balance to his credit. On August 19, 1908, through their branch office in Detroit, Michigan, where he had been accustomed to do business with them, he ordered them to subscribe for five hundred shares of the capital stock of the North Lake Mining Company on his account. There was an arrangement between this firm and the defendants, who were stock brokers in Boston, that the defendants should do all the business of A. O. Brown and Company in Boston, and A. O. Brown and Company should do all the defendants' business in New York. A. O. Brown and Company sent an order to the defendants to make this subscription at the office of the corporation in Boston, and after getting a response that the subscription had been made and that the account of A. O. Brown and Company had been charged $4,000 on account of it, they charged this amount to the plaintiff and credited his account with the five hundred shares of stock, and closed the account by sending him a check for the balance due him. Previously, on the same day, they had sent a telegram to the defendants, which was duly received, but not answered, inquiring whether the $4,000 paid for the stock in full. Later, on the same day, they sent another telegram to the defendants, asking to have the stock transferred to the plaintiff and shipped. The stock was subscribed for at $8 per share and was paid for in full by the defendants, who received temporary receipts for their payment, which were to be surrendered and exchanged for stock certificates; but this exchange could not be made until September 8. Under the custom of brokers, no commission was charged by the defendants for this service.

The findings of the judge were made upon a statement of agreed facts which included long extracts from the book accounts between the parties, from which inferences might be drawn in regard to their course of dealing and the effect of their transactions. Two separate accounts were kept by each party, one relating to the transactions of the defendants in Boston on the order of A. O. Brown and Company, and the other relating to

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the transactions of A. O. Brown and Company in New York, on the order of the defendants.

The judge was warranted in finding that these accounts and the transactions referred to in them, were intended to be dealt with independently, as each party would deal with such an account for any other party who was not a broker for whom he was doing business and who had no other account with him. The two accounts were to be considered together at the close of their transactions. The judge might also have found that there was a substantial balance in favor of A. O. Brown and Company on August 19, and immediately before and after that date, upon the account to which this transaction belonged. In the agreement under which the two firms of brokers were acting, there was an arrangement for providing margins as security for liabilities and it was stipulated that payment should be made in cash for purchases of stock at less than $10 per share. On August 20, the day after this order was given, A. O. Brown and Company caused their bankers in Boston to pay the defendants $5,000 on account, and the judge might have found that this payment was understood by the parties as covering the price of this stock. He might have found that the defendants, after the last telegram from A. O. Brown and Company relating to the transaction, and especially after the payment of the $5,000 in cash, were holding this stock as fully paid for and belonging to the plaintiff, although there had been no formal transfer to him and the regular certificates of stock could not be issued until September 8.

The controversy arises from the fact that A. O. Brown and Company failed a few days later, having in their hands a large amount of property that had been advanced by the defendants as margins on their transactions in New York. The defendants then sold the five hundred shares of stock in the North Lake Mining Company and retained the proceeds and applied them in part payment of their claim against A. O. Brown and Company. We are of opinion that there was ample evidence to warrant a finding for the plaintiff.

Judgment on the finding.

F. N. Nay & F. E. Neagle (of New York), for the plaintiff.

C. E. Hellier, (*W. P. Everts* with him,) for the defendants.

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AMANDA M. LOUGEE & another, executors, *vs.* ANNIE E. H. WILKIE & others.

Suffolk. March 15, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Will, Attestation, Codicil. *Devise and Legacy.*

A clause of a will directed that the residue of the testator's estate be equally divided between W and another. A codicil of the will provided that "all money left" to W should be held in trust by the executors, "the income to be paid her as they think best for her surport the Principle not to be used, unless necessary." W was one of the three attesting witnesses to the codicil. There was no clause in the codicil specifically revoking the will or any part thereof. *Held*, that the legacy to W in the codicil was to be considered by itself without reference to that contained in the will, the will not having taken effect when the codicil was made, and being revocable at any time before the testator's death, that the legacy was beneficial in its character, and therefore that, under R. L. c. 135, § 8, since there were not three subscribing witnesses to the codicil who did not receive a beneficial devise or legacy thereunder, the legacy to W in the codicil was void and the provision for her in the original will remained unchanged.

KNOWLTON, C. J. This is a petition filed in the Probate Court for instructions as to the disposition of the property now remaining in the hands of the petitioners as executors of the will of Martha J. Webster, late of Boston, deceased. By the ninth clause of the will all the residue of the estate is given to such of four persons named, as shall be living at the time of the probate of the will. Of these persons, Katie J. Gerry and Annie E. H. Wilkie were the only ones living at the time referred to. If there were no other provision appearing upon the subject, the residue would be divided equally between them.

The second codicil of the will of the testatrix contains this clause: "All money left by me to my sister Annie E. H. Wilkie shall be held in trust by my Executors the income to be paid her as they think best for her surport the Principle not to be used, unless necessary, all money left her by me after her death shall go to Catharine J. Gerry after her Funeral Expenses are Paid and her name carved on the Monumt and a Marker placed on her grave." Two of the three witnesses to this codicil were Annie E. H. Wilkie and Catharine J. Gerry. The R. L. c. 135, § 3, is

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as follows: "A beneficial devise or legacy which is made in a will to a subscribing witness thereto, or to the husband or wife of such witness, shall be void unless there are three other competent subscribing witnesses to such will." The question is as to each of two legacies in this clause, whether it is a beneficial legacy within the meaning of the statute. As to the legacy to Catharine J. Gerry, no question is made. It is beneficial, and therefore void.

The legacy to Annie E. H. Wilkie is beneficial in its character. It provides for her an income for her support, in the discretion of the executors, including, if need be, the principal sum which it was intended that she should take under the residuary clause when the original will was made. The question arises whether this falls short of being a beneficial legacy because it may be of less value to her than that contained in the original will would be, if that were left to go into effect unchanged. We are of opinion that this legacy is to be considered by itself, without reference to the fact that the testatrix had contemplated her receiving another legacy under a will which had not taken effect, but was revocable at any time prior to the death of the testatrix. This provision purported to give and secure to the legatee, something valuable. Whether it was less valuable or more valuable than something else that she might have received if a former will was left unchanged, was immaterial. It was a beneficial legacy which came within the terms of the statute, and was void.

The result is that the provision of the original will remains unchanged by this provision, and the property in the hands of the executors is to be divided between these two legatees in equal shares.*

So ordered.

The case was submitted on briefs.

S. H. Hollis, for the respondent Annie E. H. Wilkie.

H. A. Smith, for the respondent Catharine J. Gerry.

* There was no clause in any of the codicils specifically revoking the will as a whole or the residuary clause in particular.

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ATTORNEY GENERAL *vs.* RALPH E. STONE.

Suffolk. March 16, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Tax, On successions and inheritances. *Constitutional Law. Executor and Administrator. Res Judicata. Interest.*

The tax upon successions and inheritances is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but upon the privilege of his beneficiaries to succeed to the property thus dealt with.

By the will of one who died in 1893 the residue of the testator's estate was given to a trustee with provisions for the expenditure of the income until the happening of certain contingencies, when the principal was to be divided among the children of the testator's brother. By St. 1891, c. 425, the Commonwealth was entitled upon the death of the testator to receive a tax upon the bequests to the children, to be assessed upon their value at that time and to be paid by the executor or trustee within two years from his giving bond. St. 1902, c. 473, provided among other things that, in cases of devises or bequests, which were liable to a collateral inheritance tax, and which did not take effect in possession until after the expiration of life estates or terms of years, the tax should "not be payable nor interest begin to run thereon until the person or persons entitled thereto" should "come into actual possession of such property, and the tax thereon shall be assessed upon the value of the property at the time when the right of possession accrues to the person entitled thereto as aforesaid, and such person or persons shall pay the tax upon coming into possession of such property. The executor or administrator of the decedent's estate may settle his account in the Probate Court without being liable for said tax." The contingencies referred to in the will happened in 1904 and a nephew of the testator received $15,000. No tax under St. 1891, c. 425, had been paid. Upon an information in equity against the nephew by the Attorney General at the relation of the Treasurer and Receiver General, it was *held*, that St. 1902, c. 473 was not open to the objection that it impaired vested rights of property, or that it caused unreasonable and unjust discrimination, or that it denied to the respondent the equal protection of the laws, and was not unconstitutional for those reasons; nor was its constitutionality affected by the facts that it applied only to cases in which the tax had remained unpaid, and that, whereas by St. 1891, c. 425, the trustee was required to pay the tax, by St. 1902, c. 473, the defendant was made liable therefor personally.

By the will of one who died in 1893, certain property was given to a trustee to be paid to the testator's nephew at the termination of a life estate. The final account of an administrator with the will annexed, showing the payment of the trust fund to the trustee, was allowed by the Probate Court in 1896 without the collateral succession and inheritance tax, imposed by St. 1891, c. 425, and required to be paid by the administrator or trustee, being paid, and without any proceedings being taken in accordance with § 18 of that statute to make the Commonwealth a party to the proceedings with regard to the estate. After the passage of St. 1902, c. 473, making the tax due from and payable by the

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beneficiary upon his coming into possession, the estate was distributed by the trustee and his final account was allowed without the tax being paid. *Held*, that the right of the Commonwealth to insist upon the nephew paying the tax was not affected by the allowance of the accounts of the administrator and of the trustee, the Commonwealth being in no sense a party to the proceedings in the Probate Court.

A testator died in 1893 and by his will directed that the residue of his estate, after the happening of a contingency, should be given to his nephew. The contingency happened and the nephew received $15,000 in 1904. Although a collateral legacy tax was due to the Commonwealth under the provisions of St. 1891, c. 425; St. 1902, c. 473, none was paid and in 1910 the Attorney General at the relation of the Treasurer and Receiver General brought an information in equity against the nephew to compel the payment of the tax and contended that under St. 1902, c. 473, interest should be paid upon the tax from the date when the nephew received the money, and that that statute was not affected by St. 1909, c. 527, § 10, which made amendments of St. 1907, c. 563, §§ 4, 7, contained in §§ 2, 4, of the 1909 statute, "apply to all cases in which the tax" remained "unpaid at the date of the passage" of the 1909 statute. St. 1907, c. 563, § 4, made such a tax payable at the expiration of one year from the time when the right of possession accrued. *Held*, that the statutes of 1907 and 1909 were intended to deal with the whole subject of taxation of successions, that the language of St. 1909, c. 527, § 10, should receive the general application which its words import, and therefore that interest was not due from the defendant until 1905.

INFORMATION IN EQUITY, filed on February 14, 1911, under the provisions of St. 1909, c. 266, § 1, at the relation of the Treasurer and Receiver General, seeking to compel the payment of a succession and inheritance tax alleged to be due from the defendant under the provisions of St. 1891, c. 425; St. 1902, c. 473.

The case was reserved by *Hammond*, J., for determination by the full court.

The facts are stated in the opinion.

F. T. Field, Assistant Attorney General, for the plaintiff.

S. R. Wrightington, for the defendant.

SHELDON, J. E. Fenwick Stone died in 1893. By his will he bequeathed the residue of his estate to a trustee, and provided that the income thereof should be expended for the education and support of some of his brother's children, and that in 1904, in the events that have happened, the residue itself should be divided equally among that brother's children. The defendant, being one of those children, received on January 1, 1904, into his actual possession from the trustee property to the amount of $3,750 and on April 12, 1904, to the further amount of $11,358.62. The Attorney General claims that the defendant

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is liable for a tax of five per cent on these amounts with interest from the respective dates stated, under the provisions of St. 1902, c. 473. The defendant denies his liability on the grounds, first, that the statute is, as applied to this case, unconstitutional; and secondly, that recovery against him is barred by reason of the fact that the Probate Court has allowed the accounts of the administrator of the testator's estate and of the trustee under the will without having required payment of the succession tax.

The case comes within the terms of the statute. That statute reads as follows: "In all cases where there has been or shall be a devise, descent or bequest to collateral relatives or strangers to the blood, liable to collateral inheritance tax, to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or a term of years, the tax on such property shall not be payable nor interest begin to run thereon until the person or persons entitled thereto shall come into actual possession of such property, and the tax thereon shall be assessed upon the value of the property at the time when the right of possession accrues to the person entitled thereto as aforesaid, and such person or persons shall pay the tax upon coming into possession of such property. The executor or administrator of the decedent's estate may settle his account in the Probate Court without being liable for said tax: provided, that such person or persons may pay the tax at any time prior to their coming into possession, and in such cases the tax shall be assessed on the value of the estate at the time of the payment of the tax, after deducting the value of the life estate or estates for years; and provided, further, that the tax on real estate shall remain a lien on the real estate on which the same is chargeable until it is paid." St. 1902, c. 473, § 1. This was not affected by St. 1903, c. 276, for the second section of that act provided that it should not apply to the estate of any person deceased before its passage. But the act of 1902 did apply to such estates; its operation was retrospective as well as prospective. *Stevens* v. *Bradford*, 185 Mass. 439. The bequests for the benefit of the brother's children were liable to a tax under St. 1891, c. 425; and that tax has not been paid. We come therefore to the question of the constitutionality of the act of 1902.

The Commonwealth was entitled upon the death of the testa-

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tor to receive a tax upon the bequests to these children, to be assessed upon their value at that time, and to be paid by the executor, administrator or trustee within two years from his giving bond. By the statute now before us, it was to be assessed upon the value of the property at the time when the right of possession accrued to the beneficiary, and was to be paid by him upon coming into possession. In this case, by reason of an increase in the value of the property, this results in a considerable increase of the amount of the tax. Three changes were made by the statute: the time for the payment of the tax was extended for some years, and the date from which interest would run was correspondingly postponed; the tax was assessed upon a valuation made at a later time, whereby it has been increased; and the liability for its payment was put directly upon the defendant instead of resting upon the administrator.

Certainly the first of these changes was not beyond the power of the Legislature. It was not at all to the detriment, but for the advantage of the taxpayer. It could not in any event increase the charge upon his property; it might materially diminish the amount of interest to be paid, and so lessen the burden put upon him.

The second change seems to have had a double purpose. It was designed to do away with the injustice which under the existing statutes might be done to a tenant for life whose interest was then not taxable, as was pointed out in *Stevens* v. *Bradford*, 185 Mass. 439, 441. It aimed also to do more exact justice both to the Commonwealth and to taxable beneficiaries in remainder, by taxing them upon the real value of what they should receive rather than upon a value fixed by estimation which must be determined sometimes many years before their receipt of the property and which could but rarely accord exactly with the real value of what afterwards should come to them, which might sometimes so far exceed that real value as to subject them to an onerous and disproportionate burden, and in other cases might be materially less than that value, and so afford them a partial exemption, all of which might result in such an unjust discrimination as was condemned in *Succession of Pritchard*, 118 La. 883, 886. The statute substituted a valuation by the same uniform standard, the real value when the property came to the benefi-

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ciary, for an uncertain valuation to be made in advance of that time. This was within the language of Parsons, C. J., in *Boston & Maine Railroad* v. *State*, 75 N. H. 513, 517, that in order to tax all property equally it must be valued by the same standard. Certainty was substituted for uncertainty, just as has been done by this court in the assessment of damages for the taking of land by eminent domain, where juries are told to consider what has been actually done after the taking instead of speculating upon what was likely to be done. *Buell* v. *County of Worcester*, 119 Mass. 372. *Woodbury* v. *Beverly*, 153 Mass. 245. *Butchers' Slaughtering & Melting Association* v. *Commonwealth*, 163 Mass. 386, 390. *Manson* v. *Boston*, 163 Mass. 479, 480. *Como* v. *Worcester*, 177 Mass. 543. Such an alteration, designed and adapted to bring about uniformity of taxation by assessing the inheritance of each individual according to its value when he receives it, is not of itself beyond the power of the Legislature in such a case as is now presented.

This is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but also upon the privilege of his beneficiaries to succeed to the property thus dealt with. *Minot* v. *Winthrop*, 162 Mass. 113, 124. *Crocker* v. *Shaw*, 174 Mass. 266, 267. The privilege is not fully exercised until the property shall have come into the possession of the beneficiary. This rule underlies the reasoning of *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588. And see the cases there cited. Until the full exercise of such privilege and while as yet no tax has been assessed and paid thereon, we see no reason why, by a general rule applicable to all such cases, any pending liability to taxation may not be regulated so as to subject it to a just and uniform method of assessment, even though some change may thereby be made from the method previously adopted. This involves no infringement or impairment of vested rights; it causes no unjust discrimination by substituting a just and equal assessment based upon actual values for the necessarily uncertain and unequal determination by the opinions of appraisers, however expert, of future and contingent values. It does not deny to the defendant the equal protection of the law; it applies the same rule to him as to all other persons in the same situation, and such cases as

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James v. *American Surety Co.* 133 Ky. 313, 319, 320, have no bearing. We cannot regard the statute as unconstitutional by reason of this change.

Nor is it unconstitutional because it applied only to cases in which a succession tax remained unpaid. This is governed in principle by *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588, in which a statute applying only to powers of appointment "derived from any disposition of property made prior to September first, nineteen hundred and seven," was held to be constitutional.

By the third change, a personal liability for the tax is imposed upon the defendant. But this puts no greater burden upon him. Formerly the tax would have been paid by the administrator, and the defendant would have received so much less. By the new statute, he receives the full amount bequeathed to him, and must himself pay the tax. He is required to pay into the public treasury only the additional amount which by the statute he receives directly from the trustee and indirectly from the administrator. He is not harmed by this. Moreover, he is merely subjected to the payment of an excise tax upon the privilege of receiving property bequeathed to him, and is required to pay it only when he is allowed by our laws to have the actual enjoyment of this privilege.

We may add that the constitutionality of this statute, though not in terms passed upon, was referred to by the Attorney General in argument and was assumed by the court in *Stevens* v. *Bradford*, 185 Mass. 439. And see to the same general effect *Moffitt* v. *Kelly*, 218 U. S. 400; *Cahen* v. *Brewster*, 203 U. S. 543; *Orr* v. *Gilman*, 183 U. S. 278; *Wright* v. *Blakeslee*, 101 U. S. 174; *In re Howard's Estate*, 80 Vt. 489; *Short's Estate*, 16 Penn. St. 63; *Ferry* v. *Campbell*, 110 Iowa, 290; *Gelsthorpe* v. *Furnell*, 20 Mont. 299; *Succession of Stauffer*, 119 La. 66.

The defendant's liability could not be affected or destroyed by the action of the Probate Court upon the accounts of the administrator or of the trustee.* *Estate of Lander's*, 6 Cal.

* The second and final account of the administrator with the will annexed was allowed on April 23, 1896. The first account of the trustee was allowed on February 6, 1902, his second account on March 5, 1903, and his third and final account on May 19, 1904.

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App. 744. That action could not operate collaterally to bar the remedy now sought for. Neither the second nor the final account of the trustee was allowed until after the statute before us had taken effect. If the administrator did not comply with the statute in force when he filed his final account, this failure merely left the succession tax upon the residue of the estate unpaid, and so brought it within the operation of the statute of 1902. The Commonwealth was not a party to any of these accounts, nor was it made so by the publication of notice. It could not have been made a party without its own consent or in the manner provided by St. 1891, c. 425, § 18, which was then in force. That statute was not complied with; and the decrees of the Probate Court, whether or not absolutely void, were at least not binding on the Commonwealth. *Bartlett* v. *Slater*, 182 Mass. 208. *Montgomery* v. *Gilbertson*, 134 Iowa, 291. *Lacy* v. *State Treasurer*, 121 N. W. Rep. 179.

The New York decisions relied on by the defendant have not commanded assent in this court. Some of them are referred to in *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588, 593. The California cases cited in his behalf turned upon the language of the Constitution of that State.

We have examined all the decisions referred to by the counsel for the defendant and have considered all the suggestions made for him in argument; but we entertain no doubt of the conclusions which we have reached.

He contends further that his liability accrues, not from the dates when he received the property, but only from one year after those dates. This is under the provisions of St. 1909, c. 527, §§ 2, 4, which by § 10 are made applicable "to all cases in which the tax remains unpaid at the date" of the passage of that act. The Attorney General argues that this refers only to the taxes imposed by St. 1907, c. 563, and not to the tax imposed by St. 1902, c. 473. But this is too narrow a construction of the later act. It is true that most of its sections are merely amendments of the statute of 1907, and refer only to the taxes imposed by that act. But the statutes of 1907 and 1909 were designed to deal with the whole subject of the taxation of successions. In our opinion, the language of § 2 of the St. of 1909, as extended by § 10 of the same act, should receive the general application

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which its words naturally import. It follows that the defendant's liability should be taken to accrue and interest must be computed only after the expiration of one year from the times of his acquiring possession of the property bequeathed to him, that is, from January 1 and April 12, respectively, of the year 1905.

The Attorney General is entitled to a decree for the payment by the defendant of the amounts claimed in the information, with interest as above stated.

So ordered.

CHARLES W. CROSBY *vs.* VERNAL E. CLEM.

Suffolk. March 20, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Husband and Wife. Mortgage, Of personal property.

A wife may take and hold by transfer a note and mortgage upon which her husband is primarily liable, without extinguishing either, and, while she cannot herself enforce such obligations against her husband during his life, she may transfer them without consideration to a third person who in his own name can enforce them at her request.

A wife at the request of her husband paid the purchase price of a stock of merchandise conveyed to him. Thereafter, differences arising between them, the husband paid to the wife a certain amount of money and executed and delivered to the wife's brother a promissory note for the entire amount previously advanced by her, and, to secure the note, a mortgage on the merchandise and additions that had been made thereto. The brother immediately indorsed the note in blank, executed an assignment of the mortgage and delivered the note, the mortgage and the assignment to the wife, who retained them for a year and two months and then without consideration delivered the note and assigned the mortgage to the brother, who began foreclosure proceedings. The husband brought a bill in equity to enjoin the foreclosure. *Held*, that the bill must be dismissed, it being of no consequence under the circumstances that, immediately upon the delivery of the note and mortgage by the husband to the brother, the brother transferred them to the wife, or that the note was made for a past consideration.

RUGG, J. This is a suit in equity * to restrain the foreclosure of a mortgage of personal property. The bill alleges that the

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* The bill was filed in the Superior Court on November 28, 1910. The suit was heard by *Pierce*, J., who ordered a decree for the plaintiff. The defendant appealed.

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plaintiff executed a mortgage of personal property to the defendant, and that it was assigned afterwards to the wife of the plaintiff. A judge of the Superior Court found as facts that in May, 1908, the wife of the plaintiff, at her husband's request, paid $2,000 from her private property as the purchase price for the conveyance to the plaintiff of a stock of goods. Later, trouble having arisen between the two and the wife having filed a libel for divorce, an agreement was made that the husband should give to the wife $500, and to the defendant, who was the wife's brother, a note for the $2,000 so advanced by her to be secured by a mortgage on what remained of the stock of goods bought with her money and subsequent purchases, and that the wife should suspend the divorce proceedings. This arrangement was carried out on September 18, 1909. The note and mortgage were executed accordingly, and made payable and delivered to the defendant. He immediately indorsed the note in blank, and assigned the mortgage to the plaintiff's wife, and delivered them to her. She thereafter retained possession of them until November 18, 1910, when she assigned the mortgage to the defendant without consideration, who commenced the foreclosure.*

It is settled in this Commonwealth that even under recent statutes a husband cannot contract directly with his wife. But it has been repeatedly decided that since the removal of the common law disabilities of a wife there is nothing in law to prevent the husband from executing and delivering to a third person a valid note, mortgage or security for money advanced by her to the husband or for his benefit. A wife may take and hold a transfer of a note or mortgage against her husband without extinguishing either. *MacKeown* v. *Lacey*, 200 Mass. 437. The wife cannot enforce such obligations against her husband in her own name during his life, but she may against his estate after his death, and she may transfer a good title to others during his life. The note and mortgage were valid at their inception, having been, as alleged in the bill and found by the court, executed and delivered to a third person. This legality was not impaired by the fact that they were at once assigned to the wife. If the transaction is genuine, as in this case, the length of time during which

* The trial judge in his memorandum stated that the foreclosure proceedings were begun "at the wife's request."

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the title is held by the third person is of no consequence, though, where the facts are controverted, this element may be significant evidence. It has not been argued that the mortgage and the note are affected because given in the course of an adjustment of other difficulties between husband and wife, one element of which was a suspension of divorce proceedings already begun. See *Merrill* v. *Peaslee*, 146 Mass. 460; *Newsome* v. *Newsome*, L. R. 2 P. & D. 306. Apparently this was severable, relating to a distinct matter, where the strongly equitable claim of the wife for security for the money advanced from her own estate was recognized and established. Nor is it of consequence that the consideration was past and executed, as no rights of creditors are involved.

Caldwell v. *Nash*, 190 Mass. 507, is plainly distinguishable in its facts. In that case it was said, "The evidence tended to show that these notes were given by the debtor to his wife . . . and there was no evidence that Henry L. Caldwell, Jr. [the nominal payee] had any relation to the transactions except to put his name upon the back of the notes. If these notes, with the indorsements upon them, were given by the debtor to his wife for borrowed money, they were void." The course followed in the execution of the note and mortgage here in question was in substance the same as in *Spooner* v. *Spooner*, 155 Mass. 52, where (as was said in *Caldwell* v. *Nash*) "the note was made and delivered as a valid contract with a third person upon a consideration moving from the wife." It is not necessary to determine whether if no mortgage and note had been given, the wife might have secured in equity relief for the money advanced for the benefit of the plaintiff. See *Atkins* v. *Atkins*, 195 Mass. 124, 128, and cases cited. The case is within the principle of *Butler* v. *Ives*, 139 Mass. 202, *Atlantic National Bank* v. *Tavener*, 130 Mass. 407, *Holmes* v. *Winchester*, 133 Mass. 140, *Model Lodging House Association* v. *Boston*, 114 Mass. 133, and *Degnan* v. *Farr*, 126 Mass. 297.

Decree reversed; bill dismissed.

The case was submitted on briefs.

C. R. Elder, for the defendant.

J. H. Vahey & P. Mansfield, for the plaintiff.

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WILLIAM F. GREBENSTEIN *vs.* STONE AND WEBSTER ENGINEERING CORPORATION.

Middlesex. March 27, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Employer's liability: notice. *Employers' Liability Act. Notice.*

The following notice, signed by an attorney at law, was sent to the employer of one G within sixty days after G received personal injuries while at work in the course of his employment: "Gentlemen: G, who was in your employ and was very greatly injured and will probably permanently lose his eyesight, while at work on electrical appliances of the Boston Elevated Railway at Sullivan Square, and is now in the Boston City Hospital, has placed his case in my hands for adjustment. There seems to be no doubt about the liability and certainly the injury is very great. If you wish to confer with me regarding a settlement I would be glad to see or hear from you at once. Yours very truly, M." *Held*, that the notice did not satisfy the requirements of R. L. c. 106, § 75, now St. 1909, c. 514, § 132, requiring as a condition precedent to liability of the employer under R. L. c. 106, §§ 71–74, now St. 1909, c. 514, §§ 127–131, that a "notice of the time, place and cause of the injury" should be given to the employer in writing, signed by the person injured or by some one in his behalf.

MORTON, J. This case was before this court in 205 Mass. 431, where the defendant's exceptions were sustained, and it was left to the Superior Court to decide whether the plaintiff should be allowed to amend his declaration by substituting for the count at common law on which the case was tried, counts under R. L. c. 106, § 71, the act which was in force at the time of the injury complained of. The Superior Court allowed the plaintiff to amend by substituting for the count at common law a count under R. L. c. 106, for negligent superintendence, and the case came on for trial on the declaration as thus amended. The presiding judge ruled, subject to the defendant's objection and exception, that there was evidence of negligent superintendence, and by agreement of the parties submitted certain questions to the jury which they answered in favor of the plaintiff and assessed damages in the sum of $4,000. The presiding judge * was, however, of opinion that the notice was insufficient and directed a verdict for the defendant and reported the case to this court. If the ruling in regard to the notice was wrong and the facts reported would justify a submission of the case to the jury, then

* *Wait*, J.

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judgment is to be entered for the plaintiff for $4,000. Otherwise judgment is to be entered on the verdict for the defendant.

We think that the ruling was right. The notice required by the statute is a condition precedent to a right of action. Any right of action which the plaintiff otherwise would have had is lost if he fails to give a sufficient notice. The notice required must be in writing, signed by the person injured or some one in his behalf, and must be given to the employer within sixty days, and must contain a statement of the time, place and cause of the injury. The notice relied on in this case, omitting the letterhead, is as follows:

"November 5, 1907.

Stone & Webster Engineering Corporation,
No. 147 Milk Street,
Boston, Mass.

Gentlemen:

William F. Grebenstein, who was in your employ and was very greatly injured and will probably permanently lose his eyesight, while at work on electrical appliances of the Boston Elevated Railway at Sullivan Square, and is now in the Boston City Hospital, has placed his case in my hands for adjustment.

There seems to be no doubt about the liability and certainly the injury is very great. If you wish to confer with me regarding a settlement I would be glad to see or hear from you at once.

Yours very truly,
(Sgd) Howard D. Moore."

The notices required by the statute are not, as was said in *Driscoll* v. *Fall River*, 163 Mass. 105, of notices under the highway statutes, "to be construed with technical strictness, but enough should appear in them to show that they are intended as the basis of a claim against the city or town." In *Kenady* v. *Lawrence*, 128 Mass. 318, it was said that "the notice itself should show . . . either by a form of words, or by the circumstances under which it is given, that it is intended by the party giving it as a notice for the purpose of fixing his right of action." This was cited with approval in *Lyman* v. *Hampshire*, 138 Mass. 74, 77, and in *Carroll* v. *New York, New Haven & Hartford Railroad*, 182 Mass. 237, 241. In the present case the alleged notice begins with a

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statement that the plaintiff was in the employ of the defendant, and while at work on electrical appliances of the Elevated Railway at Sullivan Square was greatly injured and "will probably permanently lose his eyesight," and that he "has placed his case in my [i. e. the writer's] hands for adjustment." So far there is nothing to show that the writer is giving a notice on behalf of the plaintiff which is intended to serve as a basis of a claim under the statute. All that it amounts to is a notice that the plaintiff has been injured while at work in the defendant's employ on electrical appliances at Sullivan Square belonging to the elevated railway, and that his claim is in the writer's hands for adjustment. The notice then goes on to say that "there seems to be no doubt about the liability and certainly the injury is very great," and concludes by saying that "If you wish to confer with me regarding a settlement I would be glad to see or hear from you at once." We do not see how it possibly can be said that this calls or was intended to call the attention of the defendant to the time, place and cause of the accident with a view to laying the foundation for a claim against the defendant under the statute. The alleged notice is nothing more nor less than a lawyer's letter calling the attention of the defendant to the fact that a claim has been placed in his hands for adjustment, and cannot be regarded as in any sense a notice under the statute. The case presented is not that of an inaccuracy in giving a notice intended as the basis of a claim under the statute, but a case where no notice whatever has been given. The plaintiff has been severely injured and his case is a hard one. But we are compelled to hold that the action cannot be maintained for want of a notice.

It is not necessary to consider whether the case was properly submitted to the jury on the question of liability.

Judgment on the verdict for the defendant.

W. Flaherty, for the plaintiff.

E. K. Arnold, (*S. H. Batchelder* with him,) for the defendant.

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SHAWMUT COMMERCIAL PAPER COMPANY *vs.* PERCY H. BRIGHAM & another.

Suffolk. March 28, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Practice, Civil, Exceptions. *Rules of Court. Notice.*

The giving of an oral notice of the filing of a bill of exceptions to the counsel of the adverse party on the day of the filing and furnishing him on the same day with an unsigned copy of the bill of exceptions are not a compliance with Rule 44 of the Superior Court, which requires that notice of the filing of a bill of exceptions shall be given to the adverse party within the required time, and Rule 27, which prescribes that a notice required by the rules of the Superior Court shall be in writing.

MORTON, J. This is an action to recover upon a promissory note. The plaintiff had a verdict and the defendant alleged exceptions. The time for filing the exceptions was extended and on the last day a bill of exceptions was duly filed. Two days after the plaintiff moved to dismiss them on the ground that the defendants had given it no sufficient notice of the filing of the exceptions. The judge * ruled as matter of law that the motion should be allowed and dismissed the exceptions. The defendants excepted, and the question is whether as matter of law the motion was rightly allowed.

Rule 44 of the Superior Court, established in 1906, provides that "Exceptions alleged in . . . a civil case shall be reduced to writing and filed, and notice thereof given to the adverse party . . ." Rule 27 provides that "A notice required by, or given in pursuance of, these rules, shall be in writing. . . ." The only notice given of the filing of the exceptions was an oral notice to counsel for the plaintiff on the day of the filing, and the furnishing him on the same day with an unsigned copy of the bill of exceptions. This plainly did not constitute a written notice. *Broomfield* v. *Sheehan,* 190 Mass. 585. There was nothing which constituted a waiver or could be found to constitute a waiver of the written notice.

Exceptions overruled.

E. I. Smith, for the defendants.

E. M. Schwarzenberg, for the plaintiff.

* *Richardson,* J.

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BAR ASSOCIATION OF THE CITY OF BOSTON *vs.* JOHN J. SCOTT.

Suffolk. March 29, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Attorney at Law, Disbarment or suspension. *Practice, Civil*, In disbarment proceedings, Findings of trial judge, New trial. *Res Judicata*. *Judgment*. *Witness*, Fees.

In disbarment proceedings the technical nicety of common law criminal pleading is not required. Where in such proceedings the respondent is fully and fairly informed of the general nature of the charges against him, and in a broad sense the proof corresponds with the allegations of the petition, and the evidence has been received without objection, the respondent, after a full and fair trial, cannot object to a finding against him on the ground of variance, even if there was a slight variation between the proof and the allegations of the petition.

At the hearing of a petition for the disbarment of an attorney at law on the ground that the respondent filed false certificates as to the attendance of witnesses not in good faith and knowing them to be false, there was evidence that the respondent, who as attorney for a plaintiff had obtained a verdict, filed six witness certificates as a basis for the taxation of costs, bearing the names of seven witnesses and showing attendance for thirty-three days, whereas the witnesses had been actually in court not more than five days and the respondent could not reasonably have called them for more than eight or nine days at the most, and even this was not necessary because for thirty-one of the days certified to there was "a clear and explicit agreement" between the respondent and the attorney for the defendant that neither of them "needed to get ready" nor to "keep witnesses around" until notified by the other. It appeared that the counsel for the defendant, who by inadvertence had failed to give notice of a desire to be present at the taxation of costs, after an execution had issued for an amount including witness fees based on the false certificates, filed a motion to vacate the judgment on account of the fraudulent certificates, and that the motion was denied for lack of jurisdiction. In the disbarment proceedings the respondent requested a ruling that the questions involved had been adjudicated in the respondent's favor by the denial of the motion to vacate the judgment in the action in which the costs alleged to be fraudulent were allowed. *Held*, that the order denying the motion, having been made on the ground of want of jurisdiction, did not involve the issues on trial upon the petition for disbarment.

Where, on exceptions and an appeal by the respondent in disbarment proceedings to and from an order made by a judge of the Superior Court that the respondent be suspended from his office of attorney at law for three years, where the reprehensible conduct charged was the fraudulent collection of excessive witness fees, and, on conflicting evidence, the judge found that "the witnesses' certificates prepared and filed by the respondent were false and were known by the respondent to be false and were not made in good faith, but were improper, illegal and fraudulent," and that in his conduct respecting them "the respondent acted improperly and dishonestly and committed a fraud upon the defendant" in the action in which the witness fees were taxed as costs, it was *held*, that the determinations of fact by the trial judge, who saw the witnesses and could base his conclusions upon his personal observation of them and their voices, manner and

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facial expression in testifying, were not open to revision by this court; *and also* that a careful reading of the record showed that no error was committed and that the findings and the order made by the judge were amply warranted.

To justify the signing of a certificate of the attendance of a witness it is necessary that the person named as a witness should have attended and not merely should have been ready and willing to attend.

Persons who have been told that their attendance as witnesses at a trial will be required but who pursue their ordinary occupations without interruption cannot be treated as witnesses merely because they are ready to attend court upon notification. To entitle a person to a witness fee there must be an actual attendance either at the court house or near it under circumstances which involve a real and appreciable interference with his everyday conduct.

After a full hearing has been had upon a petition for the disbarment of an attorney at law, as in other cases, a motion for a new trial depending on the weight of evidence is addressed wholly to the discretion of the trial judge, and is not open to revision.

RUGG, J. This is a petition to disbar the respondent, an attorney at law. It alleges in substance that the respondent as attorney for the plaintiff, in an action entitled O'Halloran *v.* Boston Elevated Railway which was tried twice in the Superior Court, after a final verdict had been rendered in favor of the plaintiff, filed six witness certificates as a basis for the taxation of costs, bearing the names of seven witnesses showing attendance for thirty-three days each, the aggregate amount of which, including travel, was $372.90, which certificates were false to the knowledge of the respondent and were not made in good faith but were illegal and fraudulent; and that in making them out and instructing witnesses to sign them the respondent acted dishonestly and committed a fraud upon the defendant and the court; and that by inadvertence counsel for the defendant did not give notice of a desire to be present at the taxation of costs, and execution issued including the above mentioned amount for witness fees; that thereafter a motion was filed to vacate the judgment on account of these fraudulent certificates, which motion was denied for lack of jurisdiction; and that the respondent paid over to the several witnesses a small part only of the amount of witness fees thus collected and fraudulently and dishonestly retained, and converted to his own use the balance thereof. The respondent filed an answer in which he denied all fraudulent or corrupt acts, or any violation of his oath of office in this regard, and averred that the witness certificates were truthful and in accordance with the facts.

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There was a hearing before a judge* of the Superior Court who made a finding of facts to the effect that while the case of O'Halloran v. Boston Elevated Railway was upon the list so that it might have been called for trial, the respondent arranged with the witnesses so that they might be reached by telephone, and while some of them occasionally ran into the respondent's office as they were passing to inquire about the case, no one of them lost any time or pay in their regular employments except on the days when they were actually in court not exceeding five days in the aggregate, and that apart from any agreement the respondent could not "fairly and reasonably [have] called the witnesses for more than eight or nine days at most." But he made no finding of bad faith on this point.

He further found that whatever was done in holding witnesses for thirty-one of the days certified to, the respondent did while "a clear and explicit agreement existed between him" and the attorney for the Boston Elevated Railway Company "that neither party 'needed to get ready' nor 'keep witnesses around' until notified by the other." Upon these facts the judge of the Superior Court found that "the witnesses' certificates prepared and filed by the respondent 'were false, and were known by the respondent to be false, and were not made in good faith, but were improper, illegal and fraudulent,'" and that in his conduct respecting them "the respondent acted improperly and dishonestly and committed a fraud upon the defendant." The respondent filed certain requests for rulings, some of which were granted and others refused. After the filing of the findings the respondent excepted to certain parts thereof and filed further requests for rulings and a motion for a new trial. These were all overruled or refused and upon the findings an order of court was entered suspending the respondent from his office of attorney for three years. The respondent excepted and appealed.

1. It is argued that there is a variance between the petition and the findings in that the latter so far as fraudulent conduct is concerned are based wholly upon the agreement between counsel in the O'Halloran case that parties should not be held for trial and that this specific matter is not alleged in the petition.

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* *Raymond*, J.

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The reprehensible conduct charged was the fraudulent collection of excessive witness fees and this was the matter proved. It has been frequently decided that in petitions of this kind the technical nicety of common law criminal pleading is not required. *Boston Bar Association* v. *Greenhood*, 168 Mass. 169. *Boston Bar Association* v. *Casey*, 196 Mass. 100. The respondent was fully and fairly informed of the general nature of the charges against him. In a broad sense the proof corresponded with the allegations. The evidence was received without objection. If there had been any suggestion of its incompetency, an amendment to the petition might have been made. There appears to have been a full and fair trial, and testimony bearing upon this and other aspects of the case was introduced by the respondent. Even if there was a slight variation between the proof and the allegations it would have been immaterial. No special form of procedure is prescribed for such a petition as this is, and while courts are always sedulous to see that an attorney at law is given opportunity for a full and fair hearing, it is to be borne in mind that the primary end in view is an inquest into the conduct of one of its officers. In such an inquiry, mere forms not affecting its merits should not stand in the way of protecting the court and the public by appropriate action after a full hearing. *Randall, petitioner*, 11 Allen, 473. Moreover it is doubtful if, even in a criminal case, such slight discrepancy between allegation and proof would be of any consequence. *Commonwealth* v. *Graustein & Co. ante*, 38.

2. The request for a ruling that the questions involved had already been adjudicated in the respondent's favor was properly refused. At the hearing on the motion to vacate the judgment in O'Halloran *v.* Boston Elevated Railway the decision appears to have been made wholly upon a jurisdictional question and did not involve the issues depending upon this petition.

3. It is argued that the findings of fact made by the judge were not warranted by the evidence. The evidence was conflicting, but the witnesses were seen by the trial judge and his determinations of fact under these circumstances are not open to revision in this court. His conclusions based upon personal observation of witnesses, their voice, manner and facial expression in testifying, afford him far better opportunities for reaching

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a correct conclusion than an appellate court can possess. A careful reading of the record, however, convinces us that no error was committed and that the finding was amply warranted. Witness certificates attesting attendance for thirty-three days under the circumstances here disclosed are of themselves significant of wrongdoing. Most of the witnesses lost no time whatever from their regular employments except on the days of actual trial. Persons who pursue their ordinary occupations without interruption cannot be treated as witnesses merely because they are ready to attend court upon notification. There must be an actual attendance either at the court house or near to it under circumstances which involve a real and appreciable interference with their everyday conduct. It is attendance as a witness and not mere willingness to attend as a witness which justifies the signing a certificate. *Reid* v. *Wright*, 181 Mass. 306. The testimony of two witnesses was explicit as to the agreement between respective counsel that neither side should be held for trial for most of the days claimed in the certificates. The trial judge could believe them if he found them worthy of credence.

4. The motion for a new trial, after one full hearing had been had, was addressed wholly to the discretion of the trial judge, and is not open to revision upon this record. *Reeve* v. *Dennett*, 137 Mass. 315, 318. *Scannell* v. *Boston Elevated Railway*, 208 Mass. 513.

5. The finding of facts by the judge, to which reference has already been made, was a sufficient warrant for the order of the court to the effect that the respondent was guilty of misconduct in his office of an attorney, and for his suspension for a period of three years.

6. We have examined all the other points raised and find nothing which requires further discussion, and they have not been argued.

Exceptions overruled; order affirmed.

The case was submitted on briefs.

J. M. Gove, *G. T. Perry & G. S. MacFarland*, for the respondent.

G. D. Burrage, for the petitioner.

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FRANK D. WILDE *vs.* GEORGE F. WILDE & others.

Suffolk. March 29, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & BRALEY, JJ.

Insurance, Life. *Conflict of Laws. Assignment.*

It seems, that, where a policy of life insurance contains no provision for a settlement before the death of the insured and no such provision is made a part of the policy by any statute of the State under the laws of which the company that issued the policy was incorporated, there can be no right to surrender the policy to the company before the death of the insured and receive in exchange its value at that time, and such a policy can be given a cash surrender value only by an agreement of the insurance company to pay for the policy if properly surrendered.

Where a policy of life insurance, issued by a corporation organized under the laws of another State, was applied for and delivered in this Commonwealth, the premiums all were paid here, the insured and the beneficiary both lived here, and the insurance company did business here, the contract of insurance contained in the policy is to be construed and the rights of the parties are to be ascertained by the law of Massachusetts, although the insurance money to be paid upon the death of the insured is to be paid at the home office of the company in the foreign State.

Where by the terms of a policy of life insurance, which is taken out by a wife on the life of her husband, the amount of the insurance is to be paid to the wife or her assigns within ninety days after proof of the death of her husband, or, if the wife shall die before her husband, the amount of the insurance is to be paid to their children on like proof of death, and where by the terms of the policy no right is reserved to the insured to change the beneficiary with the consent of the company or to surrender the policy at his option for its value in cash, the husband whose life is insured has no pecuniary interest in the policy which he can assign.

In a suit in equity by the assignee of the rights of a beneficiary under a policy of life insurance, the plaintiff sought to enforce such alleged rights. It appeared that the plaintiff's assignor was a married woman, who had taken out the policy on the life of her husband, which was made payable to her upon her husband's death if she survived him, or, if she died before him, was made payable to their children, that by the terms of the policy no right was reserved to the insured to change the beneficiary with the consent of the company or to surrender the policy at his option for its value in cash, that the plaintiff's assignor, after making the assignment, had died and that her husband and her children still were living. *Held*, that by the assignment the plaintiff acquired the interest of the wife in the policy, which was contingent on her surviving her husband, and that on her death during her husband's lifetime the whole beneficial interest in the policy passed to the children of the insured, whose rights could not be affected by the assignment made by their mother; so that the bill must be dismissed.

BILL IN EQUITY, filed in the Superior Court on November 11, 1907, and amended by a supplemental bill filed on June 18,

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1909, which in turn was amended by an amendment allowed on May 11, 1910, in which the plaintiff, as the alleged assignee of two policies of life insurance, which he held as security for a certain promissory note, on which he obtained a judgment as alleged in his supplemental bill, sought to have the cash surrender value of the policies applied to the payment of the judgment, the defendant insurance company being ready to pay the values of the policies to the proper parties upon the order of the court.

In the Superior Court the case was heard by *Richardson*, J., who on a motion for a final decree, by agreement of the parties, reserved and reported the case upon the agreed facts, the testimony and the exhibits for determination by this court. The questions raised and the facts to which they relate are stated in the opinion.

E. W. Crawford, for the plaintiff.

W. H. Powers, (*W. Powers* with him,) for the individual defendants.

F. H. Nash, for the defendant insurance company, submitted a brief.

BRALEY, J. The plaintiff by the original bill as amended, and by the supplemental bill, asks to have the cash surrender value of certain policies of life insurance not yet matured applied in payment of the indebtedness of the defendant George F. Wilde, who is the insured. The right to relief is rested on the ground, that the assignments of the policies to the original creditor, to whose rights the plaintiff has succeeded, having been given as security for the debt of the insured, in which his wife, Catharine A. Wilde, who at that time was the "assured" joined, the plaintiff is entitled to a decree, ordering that the policies, which never were delivered to the assignee, shall be surrendered to the company and their value paid to him.

It would be a sufficient answer to this claim if the defense had been made that the policies on their face contain no provision for a settlement until the death of the insured, and the bill does not allege that by force of some statute of the State of New Jersey, the company's domicil, the policies were given a cash surrender value. *Haskell* v. *Equitable Life Assurance Society*, 181 Mass. 341.

But, this question not having been raised by the pleadings and the company being willing to pay the cash surrender values

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if the rights of all parties having an interest therein are released, the validity and effect of the assignments must be considered. These assignments, which having been made and delivered between parties residing here are governed by the local law, depend upon the construction of the policies. *Mutual Life Ins. Co.* v. *Allen*, 138 Mass. 24. The plaintiff contends that this question must be decided according to the laws of New Jersey. It being undisputed, however, that the insurance was applied for, the premiums paid, and the policies delivered here where the beneficiary, who was called the "assured," and the insured resided and where the company did business, the contracts, even if at maturity the insurance money was to be paid at the home office, are to be construed, and the rights of the parties ascertained, by the laws of Massachusetts. *Daniels* v. *Hudson River Fire Ins. Co.* 12 Cush. 416, 422, 423. *Thwing* v. *Great Western Ins. Co.* 111 Mass. 93, 108, 109. *Millard* v. *Brayton*, 177 Mass. 533, 537.

It consequently becomes unnecessary to consider the effect of the foreign statute, and the decision under it put in evidence by the plaintiff, and we come directly to the terms of the policies. The insurance was effected by the wife on the life of her husband, although the premiums were paid by him until the assignments. By a provision common to both policies the company agreed to pay the amount of the insurance to her or her "assigns, within ninety days after due notice and proof of the death of" the insured, "and in case the said assured should die before the decease of the said George F. Wilde then the amount of this insurance shall be payable to their children or to their guardian if under age, within ninety days after due notice and proof of interest and of the death of the said George F. Wilde. . . ." The right is not reserved to the insured to change the beneficiary with the consent of the company, or to surrender the policies at his option for their value in cash, and he had no pecuniary interest which he could assign. *Langdeau* v. *John Hancock Mutual Life Ins. Co.* 194 Mass. 56, 66. *Weatherbee* v. *New York Life Ins. Co.* 182 Mass. 342. *Blinn* v. *Dame*, 207 Mass. 159.

The language of the company's obligation to the beneficiary is not uncertain, and should be given its apparent and usual meaning. It agreed to pay the money to the wife if she survived her

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husband, and this interest passed to the plaintiff by the assignments. *Boyden* v. *Massachusetts Mutual Life Ins. Co.* 158 Mass. 544, 546. *Sullivan* v. *Maroney*, 6 Buch. 104. But, if she was the primary beneficiary, yet upon her death after the assignments were given, the insured having survived, neither her personal representatives nor assigns acquired any title to the insurance money. *Fuller* v. *Linzee*, 135 Mass. 468. If the wife predeceased her husband, the contract is, then, to pay to their children, who are to be ascertained at this period, and to succeed as beneficiaries. *Thomson* v. *Ludington*, 104 Mass. 193. The defendants, George F. Wilde, Jr., and Stella L. Wilde, having been at their mother's death the only living offspring of the marriage, their rights to the proceeds of the policies at their father's death not having been defeated by the assignments to which they were not parties, became absolute, and the bill must be dismissed with costs. *Millard* v. *Brayton*, 177 Mass. 533. *Knickerbocker Life Ins. Co.* v. *Weitz*, 99 Mass. 157. *Pingrey* v. *National Life Ins. Co.* 144 Mass. 374, 382.

Decree accordingly.

PAULINE BERENSON, administratrix, *vs.* FRANK BUTCHER & another, executors, & others.

Suffolk. March 30, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence. Animal. Joint Tortfeasors.

In an action by an administrator to recover from the employer of his intestate for the conscious suffering of the intestate from injuries caused by the running away of a vicious horse of the defendant while the intestate was in the wagon to which the horse was attached, in consequence of which the intestate jumped from the wagon and sustained the injuries sued for, if there is evidence on which it could be found that the horse was vicious and that the defendant knew it, that the intestate was in the defendant's employ and that the horse was furnished to the intestate by the defendant to be used in the defendant's business, that the intestate did not know that the horse was vicious and that the defendant gave him no warning or information as to the character of the horse, when such warning or information would have prevented the accident, the case is for the jury, and it is for the jury to say whether, taking all the circumstances into account, the intestate was in the exercise of due care or voluntarily assumed the risk of injury in jumping from the wagon as he did.

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In an action against the plaintiff's employer for personal injuries caused by the running away of a vicious horse of the defendant while the plaintiff and another employee of the defendant were in the wagon to which the horse was attached, if there is evidence that the defendant knew that the horse was vicious and that the plaintiff did not, and that the defendant was negligent in furnishing the horse to the plaintiff and in giving him no warning or information as to the horse's dangerous character, it is no defense that just before the horse ran away the plaintiff's fellow employee had taken off the horse's bridle for the purpose of feeding him on the road, for, even if the fellow servant knew that it was dangerous to attempt to feed the horse on the road by taking off the bridle and his negligence contributed to the accident, this merely would make the fellow servant a joint tortfeasor and would not relieve the defendant from liability if the jury found against him.

TORT by the administratrix of the estate of Thomas B. Berenson, to recover damages for the conscious suffering of the plaintiff's intestate caused by injuries received from the running away of a horse belonging to the defendants, copartners doing business under the firm name of the Bay State Company, on August 21, 1906, in the town of Cochituate. Writ dated October 18, 1906.

In the Superior Court the case was tried before *Harris*, J., in January, 1911. The plaintiff's intestate, who was her husband, died on August 25, 1906. William R. Brereton, one of the defendants, died in December, 1906. Martin Butcher, another of the defendants, died on January 30, 1910. It was undisputed that on August 21, 1906, the plaintiff's intestate was in the employ of the defendants as a salesman and agent; that employed with him was one Appleton, who died after the action was brought; that together on the day in question they had a horse furnished by the defendants. It also was undisputed that the plaintiff's intestate was taken to a hospital in Natick, where he died on August 25, 1906; and for the purposes of this case it was admitted that he consciously suffered from the effect of the injuries received in the runaway. It appeared from the records of the hospital, dated Natick, August 21, 1906, that the intestate described his employment as "teamster for Bay State Company."

The plaintiff testified on direct examination as follows: That she saw her husband the next day after the accident; that he was perfectly conscious; that "he told me that he was in the back of the team, fixing the merchandise, while Mr. Appleton was putting the feed bag on the horse, when the horse went

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wild, and he didn't know whether he was going to be dashed to pieces. There was a post in front of him, and he jumped to save his life"; that "he told me that he wished he had known the horse was a vicious horse. He never would have travelled with him; never worked with him"; that that conversation was on Wednesday after the accident; that she saw her husband again the following day; that he then told her the same thing; that before her husband's death she went to see the defendant Brereton; that she talked with him about her husband's injury and about the horse and that they had the following conversation: "I went in to him and I asked him — I wanted to see Mr. Brereton. He said, 'Right here.' I told him my name was Mrs. Berenson. He told me he was very sorry the case happened, and he snapped his fingers. He said, 'Too bad! Too bad! I told Mr. Butcher to get rid of the horse.' He says, 'Since Mr. Weinberg (a gentleman by the name of Weinberg) got run away with, the horse ran away with him, something to that effect. I can't remember — we must get rid of the horse. It is too bad'; and he snapped his fingers like this (illustrating). He told me he will aid me all he can, and to come on a Monday and see him. My husband died on a Saturday previous"; that her husband told her on the Thursday after the accident that "they were supposed to feed the horse on the road where there was no nearby stable, they could feed them out, and that was the orders, that was the reason he got hurt and that is how he got hurt, the horse started up with him."

One Arthur Berenson, called as a witness for the plaintiff, testified on direct examination that the day after the accident he saw the intestate at the hospital and that the intestate's statements to him were in substance as follows: "In substance he said to me that he was at work for this Bay State Company, and I asked him how long he had been at work for that company, and he said a short while. He said that he had this horse and was working on the team with Mr. Appleton. They were selling, I think he told me, chairs, at the time, for the Appleton Company — for the Bay State Company, and that he was inside the team. That is, he was on the team, with his back toward the horse, doing something. It was in Cochituate, about noon time. They were getting ready — they had stopped there, get-

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ting ready to feed the horse. He was in the team; I think he told me back of the chair. Mr. Appleton was getting ready to feed the horse, and suddenly he felt a movement of the team, and he saw — turned around and saw the horse [was] going to run away, or was in the act of running away, and to save himself, he jumped from the team. As he did so, he landed on one foot. I have forgotten which it was now, the right or the left foot, and that his foot went from under him, and he felt something snap, hard."

There was much other testimony, the result of which is mentioned in the opinion.

At the close of the evidence, the defendants asked the judge to rule that upon the law and all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling, and the defendants excepted. The defendants then asked, among others, for the following rulings:

"3. The removal of the bridle from the horse in a public street was of itself negligence and a lack of due care, and is a bar to the plaintiff's recovery.

"4. If the conduct of Appleton in the care and management of the horse contributed in causing the horse to get away, the plaintiff cannot recover."

"6. If Appleton removed the bridle without giving warning to Berenson, then the accident was caused by the negligence of Appleton for which the defendants are not liable.

"7. If the intestate knew that Appleton was about to remove the bridle from the horse, it was a lack of due care on his part to have remained in the wagon, and the plaintiff cannot recover."

"12. If the ordinary everyday way of baiting the horse was the removal of the bridle, and while such bridle was being removed it might be reasonably expected that the horse might get away, the dangers attendant upon such removal and baiting and the getting away of the horse were assumed by the plaintiff's intestate."

The judge refused to make any of these rulings. The defendants excepted to their refusal, and the judge submitted the case to the jury under instructions not otherwise excepted to. The jury returned a verdict for the plaintiff in the sum of $3,000; and the defendants alleged exceptions.

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N. N. Jones, for the defendants.

F. P. Garland, (*A. Berenson* with him,) for the plaintiff.

MORTON J. There was evidence tending to show that the horse was vicious and was known to the defendants to be so. It could have been found that the horse had run away at least twice before while the defendants had it, under circumstances similar to those in this case; that it was nervous and liable to jump; and that the stableman had had to hold it for men to get into the team. One of the witnesses testified, without objection, that he was afraid of it, and another, with whom the horse ran away, testified that he told the defendant Brereton, since deceased, that he had run away and he wanted to change it. The same witness also testified that he did not regard the horse as safe. In addition to this the administratrix, the widow of the deceased, testified that in an interview with Brereton after the accident he spoke of the horse as "a bad horse; a crazy horse"; and said that he had told the defendant Butcher, also since deceased, that they "ought to get rid of the horse." This evidence warranted a finding that the horse was vicious and that the defendants knew it. It was undisputed that the plaintiff's intestate was in the employ of the defendants and that the horse was furnished to him by them to be used in their business. There was evidence tending to show that he did not know that the horse was vicious and that the defendants gave him no warning or information as to the character of the horse. Their failure to do so could have been found to constitute negligence on their part (*Lynch* v. *Richardson*, 163 Mass. 160), and to have been the proximate cause of the accident. Whether, taking all of the circumstances into account, the deceased was in the exercise of due care, and whether he assumed the risk of jumping from the wagon as he did were plainly questions for the jury. *Warren* v. *Boston & Maine Railroad*, 163 Mass. 484. *Nisbet* v. *Wells*, 25 Ky. Law Rep. 511. There was nothing to show that Appleton knew that it was dangerous to attempt to feed the horse on the road by taking the bridle off, and, even if he did know it and his negligence contributed to the accident, the defendants would not be relieved thereby. It would be simply a case of joint tortfeasors.

Exceptions overruled.

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SELECTMEN OF WESTWOOD *vs.* DEDHAM AND FRANKLIN STREET RAILWAY COMPANY.

Norfolk. March 31, 1911. — May 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Equity Jurisdiction, To enforce condition in grant of street railway location, Laches. *Street Railway*, Enforcement of terms of location, Regulation of fares.

In a suit in equity brought by the selectmen of a town against a street railway corporation under St. 1906, c. 463, Part III. § 157, formerly R. L. c. 112, § 100, to enforce a condition contained in a location granted by the plaintiffs to the defendant, the enforcement of the terms of the location is not a matter of discretion in which a hardship that the defendant may suffer will be considered, and it is the duty of the court to enforce all valid conditions so imposed.

In a suit in equity brought by the selectmen of a town against a street railway corporation under St. 1906, c. 463, Part III. § 157, formerly R. L. c. 112, § 100, to enforce a condition imposed in a grant of location from the plaintiffs to the predecessor of the defendant, to whose franchises and privileges it had succeeded, that the rate of fare should not exceed the sum of five cents for any distance in one continuous trip within the limits of the town or from any point along the line of the road within the town to its terminus at that time in either of two other towns, it appeared that the location granted by the plaintiffs to the predecessor of the defendant became operative less than one month before St. 1898, c. 578, which deprived local boards of the power to regulate fares, went into effect. *Held*, that the condition imposed on the defendant's predecessor was binding on the defendant, that it was valid, and that its validity was not affected by the last named statute.

In a suit in equity brought by the selectmen of a town against a street railway corporation under St. 1906, c. 463, Part III. § 157, formerly R. L. c. 112, § 100, to enforce a lawful condition in a grant of location from the plaintiffs to the predecessor of the defendant, which is binding on the defendant, requiring that the rate of fare shall not exceed the sum of five cents within the town and to certain termini, it is no defense for the defendant to show that the road although conducted with economy has been operated by the defendant at a considerable loss, that the fares which the defendant has established in excess of the limitation in the grant of location are reasonable, and that, if they are reduced to the rate fixed by the grant, the service must be curtailed and the people of this and other towns will be deprived of transportation facilities now enjoyed.

In a suit in equity by the selectmen of a town against a street railway corporation under St. 1906, c. 463, Part III. § 157, formerly R. L. c. 112, § 100, to enforce a lawful condition in a grant of location from the plaintiffs to the predecessor of the defendant, which is binding on the defendant, requiring that the rate of fare shall not exceed the sum of five cents within the town and to certain termini, a delay before bringing the suit of nineteen months after the first violation of the terms of the grant by charging fares in excess of the limitation, during which period there were two further modifications in the schedule of fares and negotiations between the parties, does not constitute laches on the part of the plaintiffs, who are acting as public officers to enforce a public right.

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RUGG, J. This is a petition in equity * by the selectmen of the town of Westwood to enforce compliance with a term of a street railway location as to fares. The defendant has succeeded to the rights and franchises of the Norfolk Western Street Railway Company. On August 10, 1898, after the required precedent proceedings by a majority of the directors of the Norfolk Western Street Railway Company, a street railway corporation in process of formation under our laws, an original location was granted to it by the selectmen of Westwood, authorizing it to operate a street railway in certain public ways in Westwood. On August 19, 1898, this location was accepted by the directors of the Norfolk Western Company, "subject to all conditions and restrictions therein contained." A certificate of organization creating the Norfolk Western Street Railway Company a corporation was issued on September 23, 1898. One clause of the location was "The rate of fare shall not exceed the sum of five (5) cents for any distance, in one continuous trip, within the limits of said town, or for a continuous trip from any point along the line of said road in said town of Westwood to its present terminus in Medfield, or to its terminus in Dedham."

It does not appear under what provision of law the defendant succeeded to the location granted to the Norfolk Western Street Railway Company. We are not aware of any special act authorizing it. In each of the ways permitted in the general law, by sale or consolidation under §§ 52, 53 and 54 and at receiver's sale under §§ 144 and 145, of St. 1906, c. 463, Part III., the right acquired by the succeeding company is no more extensive or less onerous than that of the original company as to locations. In January, 1908, the rate of fare was raised above the limit prescribed in the location, and although changed several times since then, has been maintained higher than there provided. Before 1908 the road had been operated at a considerable loss for a number of years, and notwithstanding the practice of strict economy an indebtedness of several thousand dollars was accumulated. Since then its deficit has increased, although there have

* Under St. 1906, c. 463, Part III. § 157, formerly R. L. c. 112, § 100, filed in the Supreme Judicial Court on August 12, 1909. The case was heard by *Sheldon*, J., who at the request of the parties reported it for determination by the full court.

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been no allowances for depreciation and only necessary repairs have been made.

The law governing the formation of street railway companies and the granting of locations to them in force at the time was Pub. Sts. c. 113. It has been decided that under this statute a restriction in an original location fixing the maximum fare to be charged for a locality covering three towns was a valid exercise of power by the selectmen, and when accepted by the directors of the street railway company became as binding upon the corporation as if inserted in a special charter of incorporation, that subsequent legislation has not undertaken to abrogate or modify the force of such restrictions, and that they are binding upon another company succeeding to the franchises and privileges of the original company. *Selectmen of Clinton* v. *Worcester Consolidated Street Railway*, 199 Mass. 279. It is there pointed out also that the earlier cases of *Keefe* v. *Lexington & Boston Street Railway*, 185 Mass. 183, and *Selectmen of Wellesley* v. *Boston & Worcester Street Railway*, 188 Mass. 250, arose under different and more recent provisions of law and are not inconsistent with this view. The location now under consideration became operative less than one month before St. 1898, c. 578 went into effect, which among other matters marked a change in the policy of the Legislature upon the subject of fares and deprived local boards of the power to regulate fares theretofore possessed by them. But there always must be some instant of time when every alteration of statute takes effect, and up to that instant the pre-existing law prevails with as much force as it ever had.

The defendant urges that the road is operated with economy, and that the fares charged are reasonable and are about the same as the average charged by other street railways in the State, and that the management of the railway has not acted arbitrarily or without consideration to the convenience of its patrons in making successive small increases in fares in the hope of meeting expenses and has offered to elect one of the plaintiffs to its board of directors, and that out of regard to these considerations, the court ought in its discretion to refuse to grant the relief prayed for. The court is clothed with jurisdiction to enforce the terms of locations on petitions in equity

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by selectmen. Ordinarily the exercise of a judicial power conferred for the benefit of any class of persons or the public is not discretionary, but obligatory when an infringement of right is shown. It is a part of the Constitution that this Commonwealth is established "to the end it may be a government of laws and not of men." The preservation and protection of a right established under the law of the land is not discretionary, but compulsory upon the courts. That it may appear to work hardship in some directions is no reason why they should not act. While in the exercise of equity jurisprudence there is a considerable field necessarily left to the exercise of a sound judicial discretion, the present is not a case of that kind. There is nothing in the statute under which this petition is brought (St. 1906, c. 463, Part III. § 157) to indicate that any exception to the general rule was intended. If, therefore, the plaintiffs make out a violation of a valid restriction these circumstances constitute no reason for not granting the remedy afforded by the Legislature for such cases.

It also is argued that if the rates of fare now charged are reduced, the inevitable result will be that the service will be curtailed, and thus the people of this and several other towns, through which run the tracks of the defendant and its affiliated railway, will be inconvenienced and deprived of transportation privileges now enjoyed by them. However much these consequences might appeal to the sound judgment of a public board in deciding upon a course of conduct, they do not constitute a legal defense to an established right.

The defense of laches cannot prevail. An interval of about nineteen months elapsed between the first charge of fares in excess of those stipulated in the location, during which two further modifications in the fare schedule were made. There is no inflexible rule as to what constitutes laches, and each case depends upon its own facts. There would be a strong argument that, even if private obligations alone were involved, this delay in the light of the negotiations between the parties and the other circumstances did not constitute laches. The significance of delay arises when good conscience demands action. *Stewart* v. *Finkelstone*, 206 Mass. 28. But in bringing a suit of this sort, as in granting a location, the selectmen act as public officers and not

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as agents of the town. They are not seeking to protect a private interest, but to enforce a public right, the benefits of which may not be confined to a municipality of which they are officers. Laches is not commonly imputed to public officers in respect of their governmental functions or as representatives of the sovereignty. *County Commissioners, petitioners*, 143 Mass. 424, 433. *Fairbanks* v. *Mayor & Aldermen of Fitchburg*, 132 Mass. 42. See *Gaussen* v. *United States*, 97 U. S. 584; *United States* v. *Insley*, 130 U. S. 263.

There is nothing to indicate a waiver, even if it be assumed, which we do not intimate, that the doctrine of waiver can apply to such a restriction as that here sought to be enforced. Waiver is an intentional relinquishment of a known right. The selectmen do not appear to have done anything to indicate an intention not to maintain the public right.

The defendant is not compelled to operate its road at a loss. But so long as it continues to exercise the privileges conferred upon it by the location, it must do so subject to all the burdens thereby imposed. *Mandatory injunction to issue.*

E. C. Jenney, for the plaintiffs.

F. W. Eaton, (*A. C. Burnham* with him,) for the defendant.

RIVERBANK IMPROVEMENT COMPANY & another *vs.* CORNELIA H. BANCROFT & another.

Suffolk. December 1, 1910. — May 20, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Equitable Restrictions. Garage. Deed. Equity Jurisdiction, To enforce equitable restrictions. *Equity Pleading and Practice*, Decree. *Words*, "Usual outbuildings appurtenant," "Stable."

Provisions in a deed of one of several lots of land all included in a parcel owned by one person, which impose upon the land conveyed, for the benefit of the grantor and of those from time to time owning other lots in the parcel, restrictions as to the character of buildings to be placed thereon, must be interpreted in the light of the circumstances as they existed when the deed was made.

The owner in 1890 of a large parcel of land at a distance from the business section of Boston in the Back Bay district, so called, subdivided it into twenty-eight

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lots and, with the intention of making the territory a fine residential district, in selling and conveying the lots to purchasers made uniform deeds containing restrictions limiting the use of the lots to dwelling houses for the occupancy of one family, which were to be built of brick, stone or iron, and within certain parts of the lots, and the following restriction: "No stable of any kind, private or otherwise, shall be erected or maintained on any portion of said land." In 1899 one of such lots was conveyed by a deed containing such restrictions, imposed for the benefit of owners of the other lots in the parcel, to a person who built and maintained thereon a garage. *Held*, that, interpreting the word "stable" in the light of the circumstances existing at the time when the restriction was imposed, the maintenance of the garage was not a violation of the restriction against the maintenance of a stable.

The owner in 1890 of a large parcel of land at a distance from the business section of Boston in the Back Bay district, so called, subdivided it into twenty-eight lots and, with the intention of making the territory a fine residential district, in selling and conveying the lots to purchasers made uniform deeds containing restrictions limiting the use of the lots to dwelling houses for the occupancy of one family, which were to be built of brick, stone or iron and within certain parts of the lots, and the following restriction: "No buildings other than dwelling houses . . . with the usual outbuildings appurtenant thereto, shall be erected, placed, or used upon the said land." In 1899 one of such lots was conveyed by a deed containing such a restriction, imposed for the benefit of owners of the other lots in the parcel, to a person who built and maintained thereon a garage. *Held*, that the garage was not such an outbuilding as usually was appurtenant to a dwelling house in the locality in question in 1899, and that therefore its maintenance was a violation of the restriction.

Restrictions, contained in deeds in 1899 and previous thereto, of lots of land in a parcel situated at a distance from the business section of a city, which were intended to maintain the territory as a fine residential district, and which therefore prohibited the maintenance on any of the lots of a garage, are not an unreasonable hindrance to the use of the land and are not against public policy.

Where a corporation, which owned a large parcel of land, subdivided it into twenty-eight lots, which were sold to various persons, the deeds of conveyance containing certain uniform valid restrictions as to the use of the lots stated therein to have been imposed "for the benefit of the grantor and of the owner or owners from time to time of all" of the lots, the corporation, even after it no longer owns any land in the parcel, and the owner of one of the lots properly can join as plaintiffs in a suit in equity to restrain the owner of another one of the lots from violating the restrictions.

The owner of one of twenty-eight lots of land included in a parcel, all of which were subject to a restriction imposed in 1899, which this court interpreted as preventing the building or maintaining thereon of a garage, brought a suit in equity to enjoin the owner of another lot from continuing with the erection upon his lot of a garage which he had begun to build. The erection and maintenance of "usual outbuildings appurtenant" to brick dwelling houses built for the occupancy of one family were permitted by the restrictions. The defendant, while the suit was pending, completed the garage and used it as such and also as "a place to keep vegetables, double windows, blinds, and other minor household things," uses for which it was intended when it was erected, and also as a place in which to freeze ice cream and "do other small household things," and during the summer to lock up "barrels and other things about the yard." The building itself was not a nuisance and did not obstruct the view from windows

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in other houses in the parcel. *Held*, that justice would be done by a decree simply compelling the defendant to cease to use the building as a garage or as a storehouse for an automobile, and ordering the removal of the building unless it be used for a purpose not inconsistent with the restrictions.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 8, 1907, by the Riverbank Improvement Company and Albert E. Pillsbury against Cornelia H. Bancroft and her husband Charles F. Bancroft, averring that the defendant Cornelia H. Bancroft and the plaintiff Pillsbury were owners of lots in Block B, described in the opinion, which were subject to the restrictions therein set out, and that the defendants were violating those restrictions in that they had begun the erection upon their land of "a building adapted and intended to be a garage for an automobile or automobiles," and praying that the defendants be restrained from so doing.

Pending the final hearing on the bill, the defendants completed the building and put it to the uses described in the opinion.

The case was heard by *Hammond*, J., who reported it to the full court for determination. The facts are stated in the opinion.

The case was argued at the bar in December, 1910, before *Knowlton*, C. J., *Morton*, *Hammond*, *Loring*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices.

H. M. Williams, (*T. E. Stevenson* with him,) for the plaintiffs.

W. A. Rollins, for the defendants.

HAMMOND, J. The physical facts as to the size, situation and construction of the building in question are not in dispute, and the defendants admit that the building is being used by them as a garage for their own automobiles and that unless restrained by legal process they intend to continue such use. The main question on the merits is whether in the building itself or in such a use of it there is anything inconsistent with any of the restrictions to which the land is subject.

Those restrictions were imposed in the deed of the Riverbank Improvement Company, hereinafter called the company, to George Wheatland (under whom the defendants claim by mesne conveyances) dated August 11, 1899, and duly recorded; and so far as material to the question before us they are as follows:

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"First. No buildings other than dwelling houses (which word shall include club houses), with the usual outbuildings appurtenant thereto, shall be erected, placed, or used upon the said land. Such outbuildings shall be erected only on the southerly side of said twenty-foot street or way, and no portion of said outbuildings shall be higher than eight feet above the grade of the street in front of the premises hereby conveyed. No stable of any kind, private or otherwise, shall be erected or maintained on any portion of said land. . . .*

"Second. No building erected on said land shall be used for any manufacturing . . . or mechanical purposes.

"Third. No building, except the customary outhouses to dwellings, shall be erected or placed upon the said land, the exterior walls of which shall be composed of any other material than brick, stone, or iron. . . .†

"Fifth. No buildings, other than the usual outbuildings appurtenant to dwelling houses, shall be erected or placed on said land northerly of a line parallel with and distant seventy feet north from the building line established in the . . . [fourth] . . . restriction. . . ."

The plaintiffs contend that the first restriction has been violated in two respects, namely, first, that the building is not of the kind described as the "usual outbuildings appurtenant" to a dwelling house, and second, that it is a stable within the meaning of that word as used in the restriction.

It becomes necessary to look into the deed and the circumstances under which it was made. About 1890 the plaintiff company acquired title to a large parcel of land and laid it out in building lots. Block B, of which the land conveyed in the

* The remainder of the first restriction was as follows: "No building erected on this land shall be used as an apartment house, family hotel or flats, or in design or construction be fitted for occupancy by more than one family."

† Material portions of the fourth restriction were as follows: "All buildings erected on the said land shall be placed upon a line beginning at a point on Sherborn Street, on the easterly side of said piece of land marked Block B on said plan, and twenty feet distant from the northerly line of said Bay State Road, and thence extending westerly to a point on the easterly side of Granby Street five feet distant from the northerly line of said Bay State Road."

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above mentioned deed to Wheatland was a part, contained twenty-eight lots. Restrictions like those in this deed had been imposed by the company in the deeds of these lots except that in the deed of lot No. 1, which was the first lot conveyed, the clause prohibiting the erection or maintenance of a stable does not appear. The deeds were all in one standard form, and each contained a recital that the restrictions "are intended and shall be for the benefit of the grantor and of the owner or owners from time to time of all the land aforesaid constituting said Block B shown on said plan, and none other." It is apparent from the form of the deeds and from the other facts shown, that the company intended that this territory, situated upon the south bank of the Charles River and at some distance from the business section of the city, should be a fine residential district, and that it took great pains to frame the deeds in a manner calculated to make this intent effectual not only for the present but also for the future. This was to be a place for dwelling houses and the "usual outbuildings appurtenant" thereto, and (with the exception of club houses) for them alone. Under the law existing at the time those restrictions were imposed they were to have force only for thirty years. R. L. c. 134, § 20. We are dealing therefore not with restrictions unlimited as to use, but limited to thirty years, and the deed is to be construed as if the term of thirty years had been expressly inserted therein. The restrictions are to be interpreted in the light of the circumstances existing at the time they were imposed; and the words "usual outbuildings appurtenant" (to dwelling houses) as well as the word "stable" are to be construed as including only such buildings as were fairly indicated by the respective words at that time.

Under this rule of interpretation is this building a stable? In Worcester's Dictionary, edition of 1900, a stable is defined as "a house or building for horses or other beasts"; in Webster's edition of 1903, as "a house, shed, or building, for beasts to lodge and feed in; especially, a building or apartment with stalls, for horses; as, a horse stable; a cow stable"; and in the edition of 1910 in practically the same language; in the Century Dictionary, as "a building or an inclosure in which horses, cattle, and other domestic animals are lodged, and which is furnished with

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stalls, troughs, racks, and bins to contain their food and necessary equipments; in a restricted sense, such a building for horses and cows only; in a still narrower and now the most usual sense, such a building for horses only"; in the Standard Dictionary, edition of 1895, as a "building or part of a building set apart for lodging and feeding horses or cattle, especially one fitted with stalls, fastenings etc., also often for storing hay or putting up vehicles: sometimes specifically carriage-stable, cow-stable, etc." In 36 Cyc. 812, and in 26 Am. & Eng. Encyc. of Law, (2d ed.) 154, it is defined as "a house, shed, or building for beasts to lodge and feed in." See also *Dugle* v. *State*, 100 Ind. 259.

While it is true, as stated by the plaintiffs, that in the Standard Dictionary, editions of 1895 and 1908, a stable is defined as a building often used for putting up vehicles, and that in the Century and Standard Dictionaries a garage is defined as "a stable for motor-cars" and "a building, as a stable or shed, for the storing of automobiles and other horseless vehicles," we nevertheless think that the word "stable" as commonly used and understood at the time of the imposition of those restrictions, especially when contrasted with other buildings usually appurtenant to a dwelling house, carried the idea not only of a building but also the presence of domestic animals like horses or cattle as its occupants, and that such is the meaning of this word in the restriction. Accordingly it must be held that the building is not a stable within the meaning of the restriction. And this is so even if, as argued by the plaintiffs, a garage is as objectionable as a stable.

The next question is whether the building is of the kind which was usually appurtenant to dwelling houses at the time the restriction was imposed. If it is not, then its erection was in violation of the restriction. It is to be borne in mind that we are dealing with a proposed residential district of a high grade, and that this district is not in a country town but in a city, a district to be divided into building lots and to be covered substantially with dwelling houses. Whatever buildings were usually needed and occupied as aids to the use of the dwelling houses might be erected and occupied as such aids. At the time these restrictions were put on, the garage was not the kind of

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building usually appurtenant to a dwelling house. Its erection was a violation of the restriction.

It is urged by the defendants that the restriction is against public policy, and that consequently a court of equity will not lend its aid in its enforcement; and they cite some cases where, because the restrictions have been against public policy or were whimsical and tended to place an unreasonable hindrance to the use of land, equity has refused to interfere. But this case is clearly distinguishable. An automobile is a large machine, and it is generally noisy, especially when starting. The odor of gasoline by which many of them are propelled is penetrating and disagreeable; and there can be no doubt that the noises and odors attendant upon the care and action of such machines, especially when stored so near to dwelling houses as in this case, may be annoying to a person desiring a quiet home. If, in these days of noise and bulging, intrusive activities, one who has been in confusion all day desires to have a home where, awake or asleep, he can pass his hours in quiet and repose, there is no reason of public policy why, if he can get it, he should not have it. Nor is there any reason why provision should not be made for a collection of such homes in close proximity to each other. No citation of authorities is needed to show that in this Commonwealth such a restriction is reasonable and not against public policy.

It is further urged that the plaintiffs have shown no right to prosecute this bill.* But this position is untenable. Pillsbury, one of the plaintiffs, is an owner of land for the benefit of which the restrictions were imposed, and the company which imposed the restrictions may, even if no longer an owner, appear to aid in their enforcement for the benefit of their grantees.

The final question respects the relief to be granted. It is urged by the defendants that the building itself does not in any way conflict with the restrictions; that neither in size, location nor in the materials of which it is constructed does it violate the restrictions, and that the only violation consists in its use. And hence they say that the decree should not order the removal of the building, but only forbid its use as a garage. While it ap-

* It appeared that the Riverbank Improvement Company at the time of the bringing of the suit owned no property in Block B.

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peared that the building was erected principally for the automobile, yet it also appeared that it has been "used as a place to keep vegetables, double windows, blinds, and other minor household things, and was so intended to be used at the time of its erection"; that "it has also been used as a place [in which] to freeze ice cream, and do other small household things"; and that "during the summer barrels and other things about the yard are locked up there." Whether or not, as claimed by the plaintiffs, these facts are contradictory of the pleadings, there can be no doubt that they may be properly taken into consideration on the question of the kind of relief. It further appears that the building is not a nuisance and does not obstruct the view from the windows of the houses in Block B.

Even if the defendants should be ordered to take this building down upon the ground that it was originally constructed for a use inconsistent with the restriction, it is manifest that they might immediately erect one exactly its duplicate for the purposes for which, as above stated, it was intended to be used in part and has been so used. But it is to be noted that the restriction forbade the erection of the building for a garage as well as its use for that purpose.

Under these circumstances we think justice will be done by a decree which will simply compel the defendants to cease the illegal use, and further to remove the building unless it be used for a purpose not inconsistent with the restriction. There should be a decree for the plaintiffs forbidding the use of this building as a garage or a storehouse for an automobile, and for its removal unless it be used for a purpose not inconsistent with the restriction; and for costs.

So ordered.

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CONSTANTINE COKINOS *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 9, 1911. — May 20, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Street railway, In use of highway.

At the trial of an action against a street railway company for personal injuries due to a horse and wagon which the plaintiff was driving being run into by a car of the defendant, it was undisputed that as the plaintiff approached from a cross street a broad street, which was straight for a long way in both directions and in the middle of which the defendant maintained double surface car tracks between rows of iron pillars supporting elevated tracks, he saw a car approaching upon the tracks nearest to him from the direction in which he desired to go, and, in order to avoid crossing the tracks in front of that car, he drove along the broad street on the left hand side thereof until the car had passed, when he turned to cross both the tracks and his wagon was struck at the front axle by a car which approached from his right; that the plaintiff was familiar with the locality and was an experienced driver, and that his horse and wagon and harness were in proper condition and the wagon was loaded moderately, that there was a clear view down the street in the direction from which the car came and nothing to obstruct such view, and that it was raining very hard at the time. The plaintiff testified that he looked both ways and saw no car. *Held*, that on the undisputed facts there was no evidence of due care on the part of the plaintiff and that therefore the action could not be maintained.

TORT for personal injuries and damages to the plaintiff's team, caused by a collision with a car of the defendant on Washington Street in Boston near Springfield Street. Writ dated November 14, 1907.

In the Superior Court the case was tried before *Brown*, J., who ordered a verdict for the defendant and reported the case for determination by this court.

The facts are stated in the opinion.

F. H. Blackwell, for the plaintiff.

W. Kittredge, (*M. J. Sullivan* with him,) for the defendant.

HAMMOND, J. While driving home one Saturday evening in September, the plaintiff's team came into collision with a car controlled by a servant of the defendant, and his horse, carriage and merchandise were damaged.

The plaintiff testified as follows as to the circumstances of the collision: "When he reached Washington Street on Massachu-

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setts Avenue he saw a car coming from Northampton Street a little south of Massachusetts Avenue the car running north towards Boston. To avoid crossing the rails in front of this car, he turned into the left and proceeded along the left hand way which is on Washington Street between the elevated structure and the left hand sidewalk going north. He passed along on this side for a distance of about three hundred feet until near to Springfield Street, the next cross street south of Massachusetts Avenue. The car going north having passed, he turned to cross the tracks at the posts nearest to the stone crosswalk on Springfield Street to go to the right hand side of Washington Street in the direction in which he was going. When his team was across the out bound set of rails, those nearest to the plaintiff's path, his team was struck at the front axle and the left hip of the horse by a car going south toward Roxbury. The wagon was tipped over, the horse knocked down and freed from the wagon and the plaintiff thrown from his seat to the ground. The wagon and the horse were pushed along ten or twelve feet. He was familiar with the locality having done business around there for four or five years and knew that Washington Street, at and about the scene of the accident, was a big wide street, straight for a long way in both directions and that the defendant maintained double tracks thereon over which surface cars run in and out of town quite often." He further testified that "as far as traffic was concerned there was nothing in front of him and that he had a clear view north down Washington Street"; that it was raining very hard, that he was an experienced driver, that the reins were secure, the horse properly hitched, that the team was of moderate weight and loaded with boxes, and that the wagon was a covered wagon with the sides rolled up or open. He also testified that before crossing the tracks he looked both ways and did not see this car.

The car was coming directly toward him at the moment he turned to cross and was in sight all the time. It was so near him that it struck the horse before the wagon had got on the track. It is not a case where he saw the car and thought he had time to get over the track. There is no reason why he should not have seen the car. If he looked, he looked carelessly.

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While ordinarily in cases of collision between vehicles upon the highway the questions of due care and negligence are for the jury, yet where as in this case the undisputed facts show want of due care on the part of the plaintiff, it is the duty of the court in this class of cases as in any other to apply the law. In the opinion of the majority of the court the case, while not free from difficulty, must be classed with cases like *Haynes* v. *Boston Elevated Railway*, 204 Mass. 249, and cases therein cited. *Judgment on the verdict.*

JOSEPH RIVARD *vs.* JOSEPH E. AMIOT.

Bristol. March 15, 1911.— May 20, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

At the trial of an action by an employee against his employer, there was evidence tending to show that, in the course of the construction of a building, a plank was being put from the first floor of the building through a hole to the second floor; that the plaintiff with others were on the first floor pushing the plank and that near the plaintiff there was a hole into the cellar which he was using reasonable care to avoid; that the defendant himself with other employees was on the second floor pulling the plank up; that, by the desire and in accordance with the intention of the defendant and partly from his exertions, those on the second floor gave the plank an unusually quick pull which caused those on the first floor partially to lose control of it so that its end swung around and knocked the plaintiff through the hole into the cellar. *Held*, that the questions, whether the plaintiff was in the exercise of due care and whether the defendant was negligent, were for the jury.

TORT for personal injuries received by the plaintiff while in the employ of the defendant and assisting in the construction of a building. Writ dated December 18, 1908.

In the Superior Court the case was tried before *Hardy*, J. The facts are stated in the opinion. At the close of the evidence the presiding judge refused to rule that upon all the evidence the plaintiff could not recover, or that there was "no sufficient evidence to warrant the jury in finding" either that the plaintiff was in the exercise of due care or that the defendant was negligent. The jury found for the plaintiff in the sum of $1,250; and the defendant alleged exceptions.

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D. F. Slade, for the defendant.

J. W. Cummings, for the plaintiff.

HAMMOND, J. There is no question as to the pleadings. Upon the evidence the jury might have found that at the time of the accident the plaintiff, by the order of the defendant, for whom he was at work, was engaged in helping put the plank through the hole in the second floor; that in doing this he stood with two others upon the first floor and was pushing the plank, which at the same time was being pulled by three persons, including the defendant, upon the second floor; that while all were thus working to move the plank an unusually quick and forward movement was given by those pulling on the second floor; that this movement was intended and desired by the defendant and was due in part to his own manual exertions in pulling; that as the natural result of the movement those on the first floor partially lost control of their end of the plank, by reason whereof that end swung, and, hitting the plaintiff, knocked him through a hole in the first floor into the cellar, whereby he was injured.

The jury might further have found that the plaintiff was fully aware of the hole in the first floor, and was using reasonable care not to fall into it; that he had no reason to anticipate the sudden forward and swinging movement of the plank, and that in no way was the accident attributable to any lack of care on his part; and further, that the movement was due in part to the actual manual act of the defendant, and that in view of the injury liable to occur to those below standing so near to the hole because of such a movement, the violent pulling was a careless act.

Upon such findings the plaintiff had a case. The question of liability was properly submitted to the jury. See *Connolly* v. *Booth*, 198 Mass. 577; *Bowie* v. *Coffin Valve Co.* 200 Mass. 571; *Sarrisin* v. *Slater & Sons*, 203 Mass. 258. In this last case the decision was for the defendant on the ground that the act of which the plaintiff complained was the act of a fellow servant and not the act of the defendant or of a superintendent. In the present case the act of which the plaintiff complains was in part the personal act of the defendant.

Exceptions overruled.

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JOSEPH A. CORAM *vs.* ANDREW J. DAVIS & others.

Suffolk. March 15, 16, 1911. — May 20, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Equity Jurisdiction, To apply for satisfaction of debt trust fund created for that purpose, Adequate remedy at law, Statute of limitations, Laches. *Subrogation. Contract*, Construction. *Trust. Executor and Administrator. Equity Pleading and Practice*, Bill, Demurrer, Parties.

By an instrument purporting to be his will, an alleged testator left practically all of his property to one brother of several brothers and sisters. Descendants of other brothers and sisters, who, in case of intestacy, would have been entitled to seven twenty-seconds of the estate of the decedent, contested the allowance of the will, and procured large advances of money for that purpose from a stranger to whom and to one of their own number they assigned a part of their "interests in said estate" of the alleged testator, the proceeds of the interests so conveyed to be used, first, to repay all moneys advanced, second, to pay "lawyers bills and for other expenses." After a trial and a disagreement of the jury, and after a series of compromise agreements with other next of kin of the alleged testator, a decree was made allowing the will and adopting all of the agreements, so that the contestants, instead of receiving no part of the estate, received five twenty-seconds of it, and provision also was made for the payment of all their expenses, which were very large. *Held*, that for the repayment to him of the advances so made by him the stranger was entitled to an equitable charge upon the interests, of which he had taken an assignment, in the shares due to the contestants under the compromise decree, the fact that the will was allowed not being material because such allowance was merely formal, the decree accompanying it being virtually a disallowance of the provisions of the will in favor of the contestants.

By an instrument purporting to be his will, an alleged testator left practically all of his property to one brother of eleven brothers and sisters. Some others of the next of kin of the decedent, who in case of intestacy would have been entitled to seven twenty-seconds of the estate, contested the allowance of the will, and a stranger, on their promise to reimburse him from their shares, made large advances of money to them for that purpose and on their behalf employed counsel to whom he agreed to pay a large fee "in case the will is defeated and our clients get their shares." Pending the contest the brother who was to benefit by the will died. After a trial which resulted in a disagreement of the jury, a compromise agreement was made whereby those succeeding to the brother's interests were to receive twenty, and the contestants were to receive thirty-five one-hundred tenths, and each group was to receive "on account of expenses heretofore incurred" $500,000, the balance to be equally divided between the two groups, and, to carry out the agreement, those succeeding to the brother's interests and the contestants were each to receive twenty one-hundred tenths forthwith, the remaining fifteen one-hundred tenths to be paid to the contestants when all court proceedings properly were ended, and the remainder of the estate was to be

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placed in the possession of trustees to carry out the agreement. The agreement also provided that all expenses incurred in carrying it out should be furnished, one half by those succeeding to the brother's interests and one half by the stranger, one of the trustees and one of the contestants, and "that the parties who furnish such funds shall be entitled to reimbursement." The stranger, with the trustee and the contestant referred to, signed the agreement and agreed to make advances according to its provisions, and the stranger made further advances. After extended negotiations with the other next of kin a decree finally was made distributing the estate in accordance with agreements of the parties, and a fund was paid to the trustees. The counsel brought a suit against the stranger and recovered judgment for his fee contingently promised. *Held*, that the stranger, both for the re-payment of the advances of money which he had made and for the payment of the judgment for the contingent fee of the counsel whom he had employed, was entitled by a suit in equity to avail himself of the fund thus set apart for the relief of the contestants, and, through them, for his relief.

By an agreement in writing made between the parties to a contest as to the proof of a will, it was provided that a part of the estate of the decedent should be paid to trustees who therefrom should pay a certain amount to each of the parties to the contest "on account of expenses and litigation heretofore incurred," that "all expenses incurred in the carrying out of" the agreement should be furnished, one half by one of the parties to the contest, and one half by one of the trustees, the other contestant and a stranger who previously had made advances, and "that the parties who furnish such funds shall be entitled to reimbursement of the same." The three parties who by the provisions of the agreement were to pay the second half of the expenses incurred in carrying it out also signed an agreement, appended thereto, that they would "from time to time, as required by the representatives of the parties" named in the agreement, advance one half of such expenses. The stranger advanced large sums of money for the carrying out of the agreement without the trustees requiring him so to do. *Held*, that the limitation of the stranger's undertaking as to making advances, that they should be required by the parties, did not preclude him from establishing an equitable charge upon the funds in the hands of the trustees for all of his advances, since the agreement creating the trust provided that all sums advanced for the purpose of carrying out the agreement should be repaid.

While a final decree of a court having jurisdiction of the subject matter of the settlement of the estate of a decedent, determining the parties to whom and the proportions in which the estate shall be divided if a division is made, conclusively determines those matters, a suit in equity may be maintained against the administrator and certain persons named in the order as to distribution to compel the defendants to recognize the validity of an equitable charge upon such of the funds in the hands of the administrator as are due under the decree to the other defendants.

Where one, who has made advances of money and rendered himself liable for the payment of a further sum on behalf of certain of the next of kin of a decedent in a contest against the allowance of the decedent's will, has a right to charge with the payment of such sums certain parts of the shares of certain of the next of kin and a fund which, by a decree of the Probate Court adopting compromise agreements of the parties, was to be paid to trustees for the payment of expenses attending the contest, he may enforce such right by a bill in equity, to which a demurrer on the ground that he has an adequate remedy at law will not be sustained.

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The fact, that in a bill in equity different means are sought for the enforcement of one equitable right relating to the whole or different parts of one estate, does not make the bill multifarious.

It is not indispensable that all the parties to a suit in equity should have an interest in all the matters contained in the suit. It is sufficient if each party has an interest in some matters in the suit and that they are connected with the others; and, even if one is a necessary party to one part only of the case, the bill is not therefore necessarily multifarious.

In a bill in equity there were joined as parties defendant the administrator of an estate, and all the parties who by a decree of the Probate Court were found to be entitled to share in the final distribution of the estate, including certain persons to whom as trustees was to be paid from the estate a fund which they were to use in paying expenses of various of the next of kin in bringing about a settlement of a contest as to the allowance of an alleged will of the decedent. A partial distribution of the same estate in administration in another State had taken place. By the bill the plaintiff sought to charge the shares of certain of those interested as distributees and the trust fund with the payment to him of sums which he had advanced for such distributees in furthering the contest and bringing about the settlement, and also to compel the payment to him of the shares of two of the distributees which he had purchased. *Held*, that the bill was not multifarious, since it sought the determination of all rights of the plaintiff in a single estate, and it was for the interest of all parties that the whole question of the plaintiff's rights in the estate should be settled once for all in one suit.

In a suit in equity to charge with a debt due to the plaintiff from one group of defendants certain funds in which the other defendants are interested, if it appears from the allegations of the bill that an action at law by the plaintiff against the alleged debtors would be barred by the statute of limitations, but those defendants do not demur to the bill, demurrers of other parties on that ground will be overruled.

Where, from the allegations in a bill in equity, to enforce a claim of the plaintiff against the interests of certain persons in the estate of a decedent and against a fund to be paid from such estate to certain trustees, it appears that the bill was brought within four months after a decree of the Probate Court determining the rights of the defendants in the estate, a demurrer to the bill will not be sustained either on the ground that it is barred by the statute of limitations or by laches.

If, from the allegations of a bill in equity, seeking to enforce a right of subrogation to the rights of one who had maintained a successful suit against the plaintiff, it appears that the bill was filed within fourteen months after the final decree in the suit against the plaintiff, the bill is not demurrable, either on the ground that it is barred by the statute of limitations or that it is barred by laches of the plaintiff.

Where a bill in equity respecting a claim which arose in another State does not contain allegations as to the law of that State regarding the limitation of actions, a demurrer on the ground that the cause of action was barred by the statute of limitations of that State cannot be sustained, since the law of such State is a fact in a suit here and no allegation as to it appears in the bill.

BILL IN EQUITY, filed on February 14, 1910, in the Supreme Judicial Court and afterwards amended.

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The substance of the averments of the bill and of the exhibits annexed thereto is as follows.*

In March, 1890, one Andrew J. Davis of Butte, Montana, a man of great wealth, died. He left no widow. His next of kin by the law of Montana, as well as by that of Massachusetts, were brothers, sisters, nephews and nieces, by name as follows: John A. Davis, a brother who was substantially the sole beneficiary named in a writing purporting to be the last will and testament of Andrew J. Davis, and who, if the decedent were declared intestate, would have been entitled to one hundred eleven-hundredths of the estate; Henry A. Root, Ellen S. Cornue, Sarah Maria Cummings, Elizabeth S. Ladd, Mary Louise Dunbar, sisters and children of sisters, hereinafter called the Root group, who, if the decedent were declared intestate, would have been entitled to three hundred fifty eleven-hundredths of the estate; Harriet R. Sheffield and Henry A. Davis, children of a brother, hereinafter called the Sheffield group, who, in case of intestacy, would have been entitled to one hundred eleven-hundredths of the estate; Harriet Wood, sister, Calvin P. Davis, brother, and Elizabeth S. Bowdoin, sister, hereinafter called the Wood group, entitled, in case of intestacy, to three hundred eleven-hundredths of the estate; Elizabeth A. Smith, child of a sister, entitled, in case of intestacy, to fifty eleven-hundredths of the estate; Erwin Davis, brother, and Diana Davis, sister, each entitled in case of intestacy to one hundred eleven-hundredths of the estate.

Shortly after the death of Andrew J. Davis, the Root group associated themselves together "to secure their share as heirs in" the estate and applied to the plaintiff, who had been a business associate of the decedent in his lifetime and familiar with his affairs, "to advance the required funds, promising and agreeing to repay him for the same out of their shares when secured, in some instances two for one and in some three for one," and, relying on such promises, the plaintiff made large advances.

The alleged will was offered for probate in Montana in July, 1890, and the Root group "filed appropriate contests denying" its authenticity, and, the amount of the estate being very large, made elaborate preparations for the contest.

* The bill itself covered twenty-nine pages of the printed record, and the exhibits annexed to it covered eighty-nine more pages.

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In September, 1890, those of the Root group other than Henry A. Root assigned to him and one Wells one third of their "interests in said estate" of Andrew J. Davis in trust, to reimburse Root out of the avails thereof for all sums by him theretofore or thereafter expended, and for liabilities incurred by him, on account of the settlement of the estate and the opposing of the probate of the will, as well as all sums which he might thereafter incur on account thereof, the entire residue of the one-third to be paid to Root as compensation for his time and service in that behalf used and employed. And the instrument provided "that this assignment shall be in full for all of such claims and demands, and that no further liability shall exist against" the four heirs signing it. Wells and Root also were appointed "attorneys in fact, irrevocable," to act for the four in regard to the procuring of their interests in the estate. Wells died in 1907 and no successor to him ever was appointed.

In January, 1891, Root retained Robert G. Ingersoll, Esquire, of New York as one of a large number of eminent counsellors at law to defend the interests of the Root group on a contingent fee of $100,000, contingent on the defeat of the instrument propounded as a will, and on February 10, 1891, the plaintiff paid Ingersoll a retaining fee of $5,000.

By June 10, 1891, the plaintiff had advanced $30,000 for the Root group, and, upon his refusing to advance more, Root by an instrument in writing and under seal conveyed to him one half of the interest which he had received from the other four of his group of heirs in the preceding September, "and of all money or other property, which may be received from the estate of said Davis on account of said . . . interest, and also one-half of any interest, interests, money or property which said Root may hereafter receive from" the others of the Root group "or any other heirs of said Davis or from the estate of said Davis by assignment or otherwise, and of all fees received by him as administrator of the estate of said Davis; all of said interests, money and property to belong to and be divided between said Root and Coram in equal shares"; it being agreed that, if necessary to raise further funds, the entire interest so received from the four others of the Root group might be pledged, the pledge so created to be an equal lien on the half conveyed to the

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plaintiff and the half retained by Root; that the management of the contest should be under the joint management of the plaintiff and Root with one Charles H. Palmer as deciding referee in case of disputes, and that, on final settlement, the proceeds of the interests conveyed should be used, first, to repay all moneys advanced, second, to pay "lawyers bills and bills for other expenses," and that the remainder should be divided equally between the plaintiff and Root. And it also was provided as follows: "It is the intention of this agreement and it is hereby agreed that said Root and Coram are to be equal partners and are to divide in equal shares all money and property which may be received in any way or manner from the estate of said Davis, remaining after the payment of advances and expenses, as above provided; except, however, that said one twenty-second interest now owned by said Root individually shall be and remain his and shall not in any way come into this division."

During the trial of the will contest, the plaintiff and Root signed the following agreement for Mr. Ingersoll:

"We agree that for your services in the contest . . . rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be $100,000 and that your expenses and disbursements shall be paid in any event. There is to be no personal obligation against J. A. Coram, in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar, Mrs. Ellen S. Cornue and Henry A. Root."

The trial ended in September, 1891, in a disagreement of the jury. By that time the plaintiff had advanced upwards of $100,000. Root then represented to the plaintiff that all limitations on his power to bind the others of the Root group were removed, and, because of that representation, he procured over $25,000 more from the plaintiff for use in preparation for a second trial.

In the meantime, John A. Davis, who was practically the sole beneficiary under the alleged will, had died, and his interests were represented by his children, who hereinafter will be called the Davis group. One of them, John E. Davis, was appointed

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administrator of his father's estate. Another of them was named Andrew J. Davis.

Before a second trial of the case, a compromise agreement under seal was made between the Davis group and the Root group on April 28, 1893. The agreement, after providing in substance that, "in case said will shall be finally probated, said estate shall be divided" by giving to the Davis group two hundred eleven-hundredths "in kind," and to the Root group three hundred fifty eleven-hundredths "in kind"; each of the groups also to have $500,000 "on account of expenses and litigation heretofore incurred"; and whatever balance remained to be divided equally between the two groups, continued as follows:

"For the purpose of carrying into effect the foregoing provision, the said parties of the first part do hereby sell, assign, transfer and set over unto the said parties of the second part an undivided three and one-half elevenths (3½/11) of said estate in kind, and hereby direct that by the decree probating said will, if the same is probated, there shall be distributed immediately to said parties of the second part two and one-half elevenths (2½/11) of said estate in kind, in such interests to each of said second parties as said second parties may at that time direct.

"There shall also be distributed by said decree to said first parties two elevenths (2/11) of said estate in kind in such interests to each as the said first parties at that time may direct; provided, however, that the transfers provided for in this section of this agreement shall not be valid unless said will is probated.

"The remainder of said estate, after the distribution of the two and one-half elevenths to the said second parties and the two elevenths to the first parties, shall be distributed by said decree to Charles H. Palmer and Andrew J. Davis as joint trustees of the parties hereto, to be applied, used or distributed according to the terms and provisions of this contract, and in such distribution to said trustees shall be included one eleventh (1/11) of said estate in kind, which shall be held by said trustees; and if said will shall finally be probated and the estate distributed under said will according to the terms of this contract, said trustees are hereby directed to deliver over and transfer unto said parties of the second part in such interests to each as second parties at that time direct the said one eleventh (1/11) of said

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estate so distributed to and held by such trustees in the manner above recited."

There also were in the agreement provisions with regard to the contingency of a successful contest of the will by other beneficiaries, and it was provided in its thirteenth article "that all expenses incurred in the carrying out of this contract shall be furnished, one-half by the [Davis group] and one-half by Henry A. Root, Joseph A. Coram and Charles H. Palmer. And it is further agreed that the parties who furnish such funds shall be entitled to reimbursement of the same, together with interest at the rate of ten per centum per annum, from the date of the respective advances out of such estate." After the signatures of the Davis group and the Root group, was the following, signed under seal by the plaintiff, Root and Palmer: "In consideration of the execution of the foregoing contract, and of the reimbursement as herein provided for, we . . . hereby jointly and severally agree to advance from time to time, as required by the representatives of the parties therein named, one half of all expenses which may be incurred in carrying this contract into effect." The trust was accepted in writing by Andrew J. Davis and Palmer.

At the time of the execution of the foregoing agreement the plaintiff had advanced more than $126,000 for the Root group. The bill alleged that the clause in the agreement creating a trust fund of $500,000 in the hands of Davis and Palmer, joint trustees, was inserted to provide for reimbursement of his advances and for compensation of Mr. Ingersoll, "and said sum of $500,000 became a special trust fund for" their benefit. "Paragraph thirteen of said agreement was inserted in order to retain" the plaintiff's good will and co-operation and "in order to induce him to make further advances, as it was well known that further large outlays would be necessary before the estate could be finally settled; and in reliance thereon and in consideration thereof" he made further large advances.

Thereafter the Sheffield group "filed a contest" of the will, and on March 25, 1895, an agreement under seal was made between them and the Davis and Root groups, to which the plaintiff assented in writing, although he was not a party to it, whereby the Sheffield group were to be given forty-four eleven-

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hundredths of the estate and a decree proving the will was to be entered which should contain such provision. The agreement also provided that the interest so to be distributed to the Sheffield group should "be subject to no cost or expense of litigation save and except such as may be incurred by the general administrator of said estate in his administration, under the order of the court, and that any and all contests concerning the validity of said will or the ownership of said property of said Andrew J. Davis, deceased, by any other person or persons, shall be managed and paid for by" the Davis and Root groups.

On March 27, 1895, a decree was entered in the Montana court by consent of the Davis, the Root and the Sheffield groups, admitting to probate the will of Andrew J. Davis and directing that the Sheffield group receive from the estate forty-four eleven-hundredths, that the Davis group receive four hundred seventy-five eleven-hundredths after paying the Sheffield group twenty-two eleven-hundredths, and that the Root group receive six hundred twenty-five eleven-hundredths after paying to the Sheffield group twenty-two eleven-hundredths. The decree also provided as follows: "And the said stipulations and agreements of the parties in interest, and to be affected by this cause and proceeding is, by consent in open court, adopted and made the basis of this order and decree, according to the terms and provisions of said stipulations and agreements."

Thereafter the Wood group entered contests and on June 22, 1897, an agreement was made between them and the Davis and the Root groups by which the Davis and the Root groups agreed that each of the three individuals composing the Wood group should receive fifty eleven-hundredths of the estate. It also was agreed that, in case of a settlement with Elizabeth A. Smith, who also had filed a contest of the will, the portions to be paid to the Wood group should not be diminished thereby. There also were in the agreement the following provisions: "It is mutually understood, covenanted and agreed that all parties hereto shall, so far as in their power lies, aid in securing speedily both a partial and final distribution of the said estate or estates, according to the terms of this agreement and without the giving of any bonds, if practicable, and agree to endeavor to obtain an order of the court accordingly; and it is further agreed that no

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party to this instrument shall oppose such distribution, partial or final, and that all parties hereto shall assist, so far as in their power lies, in securing the property of said estate in Massachusetts to be forwarded by the administrators of the said estate in Massachusetts to the administrators of said estate in Silver Bow County, Montana, to be then in said county distributed as speedily as possible."

On August 6, 1897, a compromise agreement was made by the Davis and the Root groups with Elizabeth A. Smith, which provided for the payment to her of twenty-five eleven-hundredths of the estate, it being provided that such share should be free from all costs, expenses, counsel and attorney fees of the Davis and Root groups. The agreement also contained the provision quoted in the preceding paragraph from the agreement with the Wood group.

On August 24, 1897, a further decree was made by the Montana court ratifying all of the foregoing agreements and adopting them as its basis, modifying the former decree to conform with all of the agreements, and decreeing that the "parties were adjudged to have the following portions of the estate:" the Davis group, two hundred eleven-hundredths; the Root group, two hundred fifty eleven-hundredths; the Sheffield group, forty-four eleven-hundredths; the Wood group one hundred fifty eleven-hundredths; Elizabeth A. Smith twenty-five eleven-hundredths, and Davis and Palmer, trustees under the agreement of April 28, 1893, four hundred thirty-one eleven-hundredths. The decree differed from the decree of March 27, 1895, among other particulars, in that it gave to the trustees, Davis and Palmer, only four hundred thirty-one instead of five hundred eleven-hundredths of the estate, the shares of the Sheffield and of the Wood groups and of Elizabeth A. Smith being taken from the share formerly given to the trustees.

On August 26, 1897, a "first distribution" of the estate in Montana was made and a four hundred thirty-one eleven-hundredths share given to the trustees, who, "though often requested, have utterly refused and neglected to account" to the plaintiff for any part thereof, except a sum of $54,055.73, which was paid to him, but whether on account of his advances, he could not say in the absence of an accounting by the trustees.

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In October, 1897, occurred ancillary administration of the estate and proof of the will in Massachusetts. An appeal by Erwin Davis, one of the next of kin, was dismissed. According to a recital in one of the agreements previously described, Diana Davis had sold her interest to the Davis and the Root groups.

On November 25, 1898, the plaintiff purchased the shares of Elizabeth S. Ladd and Mary Louise Dunbar, two of the Root group, and they were conveyed to him.

On June 15, 1903, the administratrix of the estate of Mr. Ingersoll filed a bill in equity in the United States Circuit Court for the District of Massachusetts against the plaintiff herein, the Root group excepting Ellen S. Cornue, the trustees Davis and Palmer, and the administrator with the will annexed of the estate of Andrew J. Davis, to establish an indebtedness of $95,000 with interest, alleged to be due from the plaintiff herein and Root in accordance with the terms of the letter previously quoted, and to reach their interest in the estate in satisfaction thereof. The suit was successful (see *Ingersoll* v. *Coram*, 211 U. S. 335) and by it the plaintiff herein was deprived of "possession and control of three hundred sixty-eight and three fourteenths eleven-hundredths of" the estate and that share was appropriated to the payment of the indebtedness. The bill alleged that a final decree after rescript therein was entered "on 1909" [*sic*].

On October 26, 1909, the Probate Court for Suffolk County determined the persons entitled to share in the estate and the fractional portions to which each was entitled to be in accordance with the decree of the Montana court of March 27, 1895, previously described. An appeal was taken by parties in interest which, at the time of the filing of the bill, still was pending.

At the request of the Root group, in consideration of and in reliance upon the terms of their agreements hereinbefore described between March 24, 1890, and April 28, 1893, the plaintiff had advanced the principal sum of $98,988.45, which sum with interest was due and owing at the time of the making of the agreement of April 28, 1893; and by virtue of that agreement he became entitled to a lien upon the interest of the Root group in Massachusetts; and, in the event that the amounts of their interests were insufficient to satisfy his lien, to a further lien upon all the interests in the estate agreed to be transferred to

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Davis and Palmer as trustees by said agreement of April 28, 1893, for the unsatisfied balance with interest. And, no part of that sum and interest having been paid or satisfied, except as otherwise specified above, the bill alleged that the plaintiff was entitled to payment for the unsatisfied part of such sum and interest from the interests in the estate of Andrew J. Davis of the Root group and the interests of Davis and Palmer, trustees, in the custody of the ancillary administrator, and was entitled to a lien thereon.

Relying upon the promises and covenants of the contract of April 28, 1893, and pursuant to its terms and conditions and in consideration thereof and at the request of the parties thereto, the bill alleged, the plaintiff advanced after that date and previous to the date of the bill the sum of $49,033.08, and by virtue of the agreement of April 28, 1893, that sum, together with interest, was due and owing to him out of the interests in the estate of Andrew J. Davis, deceased, in Massachusetts of the parties to that agreement and those claiming under them or by virtue of said compromise decree of 1895 and 1897, (saving the interests of the Sheffield group except as the latter have received or claim the right to receive any portion of the trust fund established by the agreement of April 28, 1893,) and was a lien thereon.

The provision in the contract of April 28, 1893, the bill further alleged, creating a trust fund of an undivided five hundred fifty eleven-hundredths interest in the hands of Davis and Palmer as joint trustees, was for the use and benefit of the plaintiff and was established to provide for the disbursements and advances of the plaintiff already made and the obligations he had assumed, and in order to induce him to make further advances and to further obligate himself, and the said advances and obligations of the plaintiff previous to April 28, 1893, were an equitable charge and lien on that interest to the amount of $500,000.

The distributive share to which Davis and Palmer, trustees, were entitled under the decree of distribution of the Probate Court for Suffolk County, Massachusetts, of October 26, 1909, was far less than the amount of the plaintiff's claim and insufficient to satisfy it. The total amount of the funds belonging to the estate of Andrew J. Davis, deceased, in the hands of the ancillary administrator, after the payment of the lien created for

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Ingersoll by the decree of the Circuit Court of the United States and the payment of the distributive shares of the estate not subject to any lien in favor of the plaintiff, would be insufficient to pay the plaintiff's claim.

Root had acquired the interests of Sarah Maria Cummings and of Ellen S. Cornue of the Root group, and also interests in other shares for which, in violation of his agreement with the plaintiff, he did not intend to account to the plaintiff.

The parties defendant to the bill included, with the exception of Erwin Davis and Diana Davis, all of the next of kin of Andrew J. Davis or their successors, the trustees Davis and Palmer, and the Montana administrator with the will annexed of the estate of Andrew J. Davis, who also was ancillary administrator in Massachusetts.

The prayers of the bill, besides a prayer for general relief, were in substance as follows:

1. That the ancillary administrator in Massachusetts be enjoined, pending the determination of the cause, from paying to any or all of the defendants all or any part of the estate of Andrew J. Davis in Massachusetts, or from distributing the same under the decree of the Probate Court for Suffolk County, dated October 26, 1909, other than pursuant to the decree of the United States Circuit Court to be applied to the satisfaction of the lien in favor of Mr. Ingersoll;

8. That a receiver be appointed to take charge of the estate of Andrew J. Davis;

4. That judgment be decreed in favor of the plaintiff against Davis and Palmer, joint trustees, and against those of the Root group who had not sold their shares to the plaintiff for the amount of the disbursements of the plaintiff from March 14, 1890, to April 28, 1893, with interest;

5. That judgment be decreed against all of the defendants other than the administrator and the Sheffield group for the disbursements of the plaintiff since April 28, 1893, to date, with interest;

6. That the amount of advances of the plaintiff previous to April 28, 1893, with interest be adjudged a lien on the undivided interest of the Root group other than those who had assigned their interests to the plaintiff and that such lien

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be foreclosed and the proceeds applied in payment of the indebtedness;

7. That the amount of the advances of the plaintiff previous to April 28, 1893, with interest be adjudged a lien on the undivided interest of Davis and Palmer, as joint trustees, and that such lien be foreclosed and the proceeds applied in payment of the indebtedness;

8. That the amount of advances of the plaintiff since April 28, 1893, with interest be adjudged a lien on the undivided interest of all of the defendants other than the administrator and the Sheffield group, except as the Sheffield group have received or claim the right to receive any portion of the five hundred fifty eleven-hundredths set aside by the agreement of April 28, 1893, as a trust fund; and that such lien be foreclosed and the proceeds applied in payment of the indebtedness;

9. That in the event the trust fund in the hands of said Davis and Palmer as joint trustees should not be sufficient to provide for the disbursements and advances of the plaintiff made or incurred previous to April 28, 1893, judgment be decreed in favor of the plaintiff against the defendants other than the administrator for any amounts received by them under the decree of August 24, 1897, in the Montana court and to be received by them under the decree of October 26, 1909, in the Probate Court for Suffolk County in Massachusetts, which rightfully under the compromise agreement of April 28, 1893, with the plaintiff should have been distributed to the trust fund, and that the plaintiff be adjudged to have a lien on their undivided interests for such amounts and that such lien be foreclosed and the proceeds applied in payment of the indebtedness;

10. That the plaintiff in payment of the lien of Ingersoll, administratrix, be subrogated to her rights and be entitled to reimbursement for such payment out of the remaining shares of the estate belonging to the Root group and out of an undivided one half of the trust fund in the hands of Davis and Palmer, joint trustees;

11. That Root be obliged to account to the plaintiff for one half of one third of the shares of the other four of the Root group received by him under the agreement of September, 1890, together with an undivided one half of any and all interest by him

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at any time received from the estate of Andrew J. Davis which shall remain after the satisfaction of the claim of the plaintiff;

12. That the ancillary administrator be ordered to pay to the plaintiff as assignee of Elizabeth S. Ladd and Mary Louise Dunbar any balance remaining due to them after the satisfaction of the liens of the plaintiff.

The defendants Davis and Palmer, trustees, demurred to the bill (1) for want of equity; (2) because the plaintiff had a "plain, speedy, adequate and complete remedy at law;" (3) because the bill was multifarious; (4) because the plaintiff was guilty of laches, and (5) because he was barred by the statutes of limitations of Montana and of Massachusetts.

The defendant the administrator with the will annexed both in Montana and Massachusetts of the estate of Andrew J. Davis, and the defendant the administrator of the estate of John A. Davis, in behalf of the Davis group, severally demurred on the same grounds excepting the second.

The demurrers were heard by *Hammond*, J., who overruled them and reported to the full court "the question whether and to what extent the demurrers should be overruled or sustained."

C. M. Wood, (*H. B. Stanton* with him,) for the plaintiff.

E. N. Harwood (of Montana) & *H. R. Bailey*, for the defendants Davis and Palmer, trustees.

C. E. Stearns, for the defendant Leyson, submitted a brief.

SHELDON, J. The plaintiff alleges in his bill that for his advances made to the defendant Root for his benefit and for that of the other four heirs to the Davis estate for whom Root was acting (hereinafter called the Root group), he had, under the assignments made by the Root group, a lien upon fractional interests of what would be their respective shares in said estate if the will of the elder Davis should not be allowed; that by the agreement of compromise made on April 28, 1893, between the parties in interest, the will, although in form to be allowed, was in reality set aside and shares larger than they could have expected were assigned to the Root group; that by that agreement there was to be allowed to the Root group out of the estate the sum of $500,000, on account of their expenses theretofore incurred in litigation, and that this provision was intended to be a provision for the

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repayment of the advances so made by the plaintiff, and for the payment of Mr. Ingersoll, who had been employed to represent that group on the promise of a contingent fee. This agreement provided also, in its thirteenth article, that all expenses incurred in carrying it out should be furnished, one half by the parties to it of the first part, and one half by the plaintiff and two others, and provided for their reimbursement out of the estate. A decree was afterwards entered in the Montana court, in which the contest over the will was pending, admitting the will to probate, ordering distribution according to the terms of the compromise agreement and some later agreements not now material, and adopting the agreements of the parties. That court also by a later decree confirmed the agreement of compromise and the later agreements by which contests over the will were settled. The plaintiff alleges also that he then advanced further sums of money which ought, under the agreement, to have been repaid to him out of the estate as well as out of the shares of the Root group. He avers that the assets in the hands of the defendant Leyson, the ancillary administrator of the estate of the elder Davis in this Commonwealth, after paying the amount which has been found due to Ingersoll, and the shares of other heirs upon which the plaintiff has no specific right of charge, are insufficient to meet the plaintiff's demands, and claims the right to hold the assets that are or should be in the hands of the defendants Davis and Palmer, regardless of distributions thereof which they have made to the distributees of the estate. He alleges also that, after the payment of Ingersoll out of the funds which are available to him, he is entitled to be subrogated to the equitable lien or charge which it has been decided that Ingersoll has upon the shares of the Root group or parts thereof. *Ingersoll* v. *Coram*, 211 U. S. 335. He has joined as defendants the administrators of the Davis estate in Montana and in this Commonwealth, all parties interested in the estate as distributees or their representatives, and all the parties to the agreements of compromise.

1. The first ground of demurrer is for lack of equity. We are of opinion that the plaintiff shows for the payment of his advances made before April 28, 1893, an equitable charge upon the interests in the shares of the Root group, of which he had

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taken assignments. This is scarcely disputed, and need not be discussed.

These shares or rights could not come into existence, and there would be no fund upon which the plaintiff could have a charge, unless the will of Davis were disallowed; and the will was admitted to probate. But it was merely a formal allowance, and in reality all but a few minor provisions of the will were wholly set aside by the agreement of the parties and the decree of the Montana court made thereon. This has been so decided both by the Circuit Court and by the Supreme Court of the United States. *Ingersoll* v. *Coram*, 127 Fed. Rep. 418, and 211 U. S. 335. It was so held in Montana, the State in which Davis had his domicil and in whose courts the proceedings were had. *In re Davis' Estate*, 27 Mont. 490. We cannot now regard this as an open question.

Can the plaintiff resort in equity to the fund provided by the compromise agreement to meet the expenses thus far incurred in the litigation? Was this fund or any part of it so far appropriated for the payment of his claim including what might be found to be due to Ingersoll as to give this right to the plaintiff? It was not provided by the agreement that payment should be made to him or to Ingersoll; the parties were "to have and receive" it out of the amount which was to be paid by the trustees. But it was set aside for their expenses. It was a means provided to meet these liabilities, a fund out of which they were to make the payments. Under such circumstances a creditor may in equity avail himself of the means of paying his demand which have been thus set apart for the relief of his debtor and through his debtor for himself. *Wiggin* v. *Dorr*, 3 Sumner, 410. *Rice* v. *Dewey*, 13 Gray, 47. *Demott* v. *Stockton Paper Ware Manuf. Co.* 5 Stew. 124. *Harmony National Bank's Appeal*, 101 Penn. St. 428. *Dunlap* v. *O'Bannon*, 5 B. Mon. 393. *Ross* v. *Saulsbury, Respess & Co.* 52 Ga. 379. *Ex parte Dever*, 14 Q. B. D. 611. *City Bank* v. *Luckie*, L. R. 5 Ch. 773.

The plaintiff for the money furnished by him to carry out the compromise agreement rests upon the provision thereof that this should in part be furnished by him and others and should be repaid out of the estate. It is true, as was said in *Elmore* v. *Symonds*, 183 Mass. 321, 326, that a mere personal promise to

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pay a debt out of a particular fund will not create a lien or equitable charge upon the fund. *Christmas* v. *Russell*, 14 Wall. 69. *Dillon* v. *Barnard*, 21 Wall. 430. *Trist* v. *Child*, 21 Wall. 441. *Removal Cases*, 100 U. S. 457. *In re Butler's Estate*, 105 Fed. Rep. 549. *Rogers* v. *Hosack's Executors*, 18 Wend. 319. *McDonald* v. *American National Bank*, 25 Mont. 456. But this was not a naked agreement to pay the expenses in the manner provided. It was an arrangement by which the persons who were to furnish the necessary money had the right to understand that the funds of the estate, at least so far as those funds should come to the hands of the trustees, were appropriated for their payment. It was an agreement by all the parties then in interest, undertaking to provide for the disposition of the whole estate and engaging that the amounts properly furnished for the carrying out of the agreement should be repaid out of the designated fund. It authorized the custodians of the fund to apply it so far as might be necessary for this purpose. It appropriated the fund for the repayment, and thereby created an equitable charge upon it. This doctrine has been undisputed since the decision of *Legard* v. *Hodges*, 1 Ves. Jr. 478. It has been affirmed by this court. *Baylies* v. *Payson*, 5 Allen, 473. *Pinch* v. *Anthony*, 8 Allen, 536. It has been declared by other courts in elaborate opinions. *Ingersoll* v. *Coram*, 211 U. S. 335. *Walker* v. *Brown*, 165 U. S. 654. *Fourth Street Bank* v. *Yardley*, 165 U. S. 634. *Ketchum* v. *St. Louis*, 101 U. S. 306. *Fletcher* v. *Morey*, 2 Story, 555. *Stranahan* v. *Richardson*, 75 Minn. 402.

But the defendants contend that by the compromise agreement the plaintiff and his associates were to be repaid only such advances as they were required by the trustees to make. This contention is based upon the undertaking of Coram and others subjoined to the agreement that they would "advance from time to time as required" by the trustees "one half of all expenses," etc. This bound the plaintiff to make only such advances as should be required by the trustees, but it leaves unqualified the provision in the thirteenth article of the agreement that all funds furnished for "expenses incurred in the carrying out" of the agreement should be reimbursed out of the estate. The plaintiff may well have been unwilling to bind himself without limitation by an independent promise to ad-

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vance money without an assurance from the trustees that it was really needed; but the parties to the agreement did not choose to put the limitation upon their promise of repayment. Moreover the covenant of the parties of the first part to furnish one half of such expenses was unlimited, and called for no assurance or requirement from the trustees; and the obligation of repayment to the plaintiff was the same as to those parties. We cannot now for the benefit of the defendants add to their absolute obligation a limiting stipulation not contained in the agreement. The agreement as written must be taken to be the final and complete repository of the intention of the parties to it. *Bray* v. *Kettell*, 1 Allen, 80, 83. *Howland* v. *Leach*, 11 Pick. 151, 154. *Brown* v. *Fales*, 139 Mass. 21, 28.

The bill in no way seeks to overthrow the orders of distribution made in the District Court of Montana or in the Probate Court here. Indeed, those orders, establishing the funds to which the plaintiff must look and fixing their amount, are the basis upon which, if at all, the bill must be maintained. Until those orders should be made, the plaintiff's remedy would not be completely available. Even if his rights might have been established and declared before the making of those orders, yet they could not all have been enforced until those orders should be made. *Ingersoll* v. *Coram*, 211 U. S. 335, 357. Those orders, if not appealed from, conclusively establish the amounts to be distributed, the parties entitled, and the sums to be paid to each distributee; they are not now to be attacked. *Loring* v. *Steineman*, 1 Met. 204. *Crippen* v. *Dexter*, 13 Gray, 330. *White* v. *Weatherbee*, 126 Mass. 450. *Pierce* v. *Prescott*, 128 Mass. 140, 143. *Harris* v. *Starkey*, 176 Mass. 445, 447. *Tobin* v. *Larkin*, 187 Mass. 279. *Minot* v. *Purrington*, 190 Mass. 336. *Cleaveland* v. *Draper*, 194 Mass. 118. But the Probate Court does no more than to determine these questions and to order distribution accordingly. It does not concern itself with assignments or pledges of the distributive shares or with the enforcement of equitable liens thereon. Such questions must be determined in other courts; and in the case at bar the questions raised are for a court of equity to settle. *Lenz* v. *Prescott*, 144 Mass. 505, 515. Nor is it a bar to maintaining this bill that part of the property involved may be in Montana. *Ricketson* v. *Merrill*, 148 Mass. 76, 83.

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2. The reasons already stated show that the plaintiff has not an adequate remedy at law. His claim to charge for his payment the whole or some fractional parts of any of the distributive shares of this estate, or any part of the trust fund already referred to, or to reach and apply any part of that fund in the hands of distributees who have received it from the trustees either as volunteers or with notice of the plaintiff's equitable rights, plainly can be enforced only in equity. *Lenz* v. *Prescott*, 144 Mass. 505. *Ingersoll* v. *Coram*, 211 U. S. 335. The bill does not state a case in which the plaintiff has trusted merely to personal promises and must be left to rely upon them, as in *Hussey* v. *Arnold*, 185 Mass. 202, 203, and *Taylor* v. *Davis*, 110 U. S. 330. We need not consider whether, if that were the case, the bill could be maintained under the prayer for general relief or otherwise under R. L. c. 159, § 3, cl. 7.

3. It is said also that the bill is multifarious. So far as it seeks merely to recover the plaintiff's advances to the Root group and the amounts furnished by him to carry into effect the compromise agreement, this objection cannot be sustained. The bill aims at one object, the reimbursement of the plaintiff by the application of certain funds, in one or another of which all the defendants are directly or indirectly interested. The fact that different means are sought for the enforcement of one equitable right, out of the whole or different parts of one estate, does not make the bill multifarious. *Parker* v. *Simpson*, 180 Mass. 334. *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495, 499. *Lenz* v. *Prescott*, 144 Mass. 505, 512, 513. *Commercial Mutual Ins. Co.* v. *McLoon*, 14 Allen, 351. As in *Andrews* v. *Tuttle-Smith Co.* 191 Mass. 461, it is desirable that all the claims of the plaintiff which affect the administration of the estate should be disposed of in one suit. All of the defendants are properly made parties. *Attorney General* v. *Parker*, 126 Mass. 216. *Cassidy* v. *Shimmin*, 122 Mass. 406. *Graves* v. *Corbin*, 132 U. S. 571, 576, following *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 139. *Colbert* v. *Daniel*, 32 Ala. 314. The language of Devens, J., in *Lenz* v. *Prescott*, 144 Mass. 505, 513, is applicable: "The plaintiff has a demand growing out of an assignment by which every defendant was affected, and their various interests are so blended that it would be impossible to separate the investi-

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gation of them with convenience. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it is sufficient if each party has an interest in some matters in the suit, and that they are connected with the others. Even if one is a necessary party to some portion only of the case, the bill is not therefore necessarily multifarious."

The plaintiff avers also that he has purchased the interests of two of the distributees of the estate, and asks that the net amount of their shares be ordered to be paid to him. This alleged right too is a part of the general right which the plaintiff claims to have acquired in the estate and its administration. It is within the reason of the decisions last referred to. It is for the interest of all parties that the whole question of the plaintiff's rights in the estate should be settled once for all in one suit. *Noble* v. *Joseph Burnett Co.* 208 Mass. 75.

4. If the bill shows that the plaintiff's whole remedy is barred by our statute of limitations, this is ground of demurrer. *Fogg* v. *Price*, 145 Mass. 513, 516. But it is not material to determine whether an action at law for the plaintiff's advances made to the Root group before April 28, 1893, would be so barred. Those defendants have not cared to raise the question upon the demurrers. If they choose to waive the defense, it is not for the demurring defendants to set it up. Moreover, as we have seen, the plaintiff's equitable remedy against the fund here was not complete until proper action had been taken in the Probate Court; it would be hard to say that he was bound to bring his bill earlier. The same considerations apply to money furnished by the plaintiff since the date last mentioned under the compromise agreement. Nor need he seek to be reimbursed for what must be paid to Ingersoll until that liability had been established. So far as this defense depends upon the Montana statute of limitations and the local law of that State, this is matter of fact, of which, as it is not stated in the bill, we can have no knowledge except by plea and proof, and is not a ground of demurrer. And the bill is brought to enforce security which the plaintiff claims to hold by reason of equitable liens or charges. We need not consider whether such equitable security would fall with the indebtedness if the debtors should maintain this defense, or whether the plaintiff still could enforce his

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equitable security though the action at law was gone. *Shaw* v. *Silloway*, 145 Mass. 503, 506. *Townsend* v. *Tyndale*, 165 Mass. 293. This is not a good ground of demurrer.

5. For substantially similar reasons, it cannot be said that the bill shows such laches as to bar the plaintiff. The bill seems to have been brought with reasonable expedition after the decree of the Probate Court had been made. There is nothing to show that the rights of the defendants have been injuriously affected by delay. There is no fixed rule as to what constitutes laches; it depends upon the circumstances. *Snow* v. *Boston Blank Book Manuf. Co.* 153 Mass. 456, 458. See *Sunter* v. *Sunter*, 190 Mass. 449; *Manning* v. *Mulrey*, 192 Mass. 547; *Hill* v. *Mayor of Boston*, 193 Mass. 569; *Moseley* v. *Bolster*, 201 Mass. 135, The bill upon its face does not come within the doctrine of such cases as *Royal Bank of Liverpool* v. *Grand Junction Railroad*, 125 Mass. 490, 494; *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495; *Willard* v. *Wood*, 164 U. S. 502; *Holder* v. *Hillson*, 170 Mass. 466; *Doane* v. *Preston*, 183 Mass. 569; *Sawyer* v. *Cook*, 188 Mass. 163; and *Marvel* v. *Cobb*, 200 Mass. 293. See *Hawkes* v. *Lackey*, 207 Mass. 424. It may be that when the facts shall have been developed the plaintiff's case will fail in whole or in part by reason of laches or of the statute of limitations, if those defenses are set up, but we cannot say that either of them is shown by the averments of the bill.

We have not considered whether the agreements under which the plaintiff advanced money to the Root group could be avoided for champerty or maintenance, as that question has been neither raised nor argued.

Demurrers overruled.

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GEORGE G. FOX COMPANY *vs.* BEST BAKING COMPANY & others.

SAME *vs.* LESLIE A. FRIEND & another.

Suffolk. January 19, 1911. — May 22, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Unfair Competition. *Equity Jurisdiction,* To restrain unfair competition, Plaintiff must have "clean hands." *Equity Pleading and Practice,* Master's report.

A manufacturer of bread brought a suit in equity to restrain another manufacturer from offering for sale loaves of bread so closely resembling the loaves manufactured by the plaintiff as to be likely to mislead the ordinary purchaser into thinking that the defendant's bread was the plaintiff's bread, and this court held, in *George G. Fox Co.* v. *Hathaway,* 199 Mass. 99, that the plaintiff was entitled to an injunction because the loaves offered for sale by the defendant did resemble those manufactured by the plaintiff as the plaintiff alleged and the defendant did not take adequate precautions to distinguish them. In a subsequent suit of the same character by the same plaintiff against a different defendant, a master found that "the defendant's loaves . . . are, except for slight differences in the labels, substantially the same in appearance as those in question" in the first suit, but that, "upon all the facts . . . the defendant's loaves . . . were not so similar to" those manufactured by the plaintiff "as to be likely to deceive the ordinary purchaser, having some knowledge of the appearance" of the loaves manufactured by the plaintiff, "or to constitute an instrument of fraud in the hands of the retail dealer." *Held,* that the finding of the master was plainly wrong and that exceptions thereto must be sustained.

The decision of this court in *George G. Fox Co.* v. *Hathaway,* 199 Mass. 99, that a manufacturer of bread in loaves of a peculiar shape, whose bread had gained a wide and favorable reputation and was known by its visual appearance, due, among other reasons, to its shape, which was "uneconomical, and less convenient and satisfactory generally for the cutting of slices for all kinds of uses than the shapes generally adopted," could maintain a suit in equity to enjoin another baker from offering for sale bread so similar to his as to deceive the ordinary purchaser, was *held* to apply in this case, which was a suit of the same character by the same plaintiff against a different defendant, and in which a master to whom the suit was referred found that the defendant was offering for sale loaves which, "except for slight differences in labels," were "substantially the same in appearance as those in" the first suit, although the master also found "that loaves of that shape were on the whole advantageous loaves to both the plaintiff and the defendant;" because the decision in the first case did not depend on the fact that the loaves manufactured by the plaintiff were "uneconomical," or "less convenient and satisfactory generally for the cutting of slices for all kinds of uses than the shapes generally adopted."

Although a manufacturer of bread has no exclusive right to manufacture and sell loaves of a peculiar size, shape and visual appearance for which he has gained a wide and favorable reputation, and other manufacturers and dealers can

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manufacture and sell loaves of the same size, shape and visual appearance if they adopt adequate means of distinguishing their loaves from those of the first manufacturer so that the ordinary purchaser will not be deceived, the first manufacturer by a suit in equity can enjoin any one from offering for sale without adequate distinguishing marks or characteristics loaves so similar to his as to be likely to mislead the ordinary purchaser into thinking that the defendant's bread was the plaintiff's.

In a suit in equity by a manufacturer of bread to restrain another manufacturer from making and selling loaves of bread so similar to the plaintiff's in size, shape and visual appearance as to deceive the ordinary purchaser, it appeared that at one time the plaintiff had been deceiving the public by false and misleading advertisements as to the bread he manufactured, but that he had ceased to do so about a year and a half before the bringing of the suit. *Held*, that such facts alone did not prevent the plaintiff from maintaining the suit.

TWO BILLS IN EQUITY, filed in the Superior Court on June 4, 1908, substantially alike excepting for the names of the parties defendant, seeking to restrain the defendants from offering, exposing or selling bread in a loaf having the general visual appearance of a loaf manufactured and sold by the plaintiff under the name "Creamalt."

The cases were referred to Charles E. Shattuck, Esquire, as master. Besides making the findings stated in the opinion, the master found, as the basis of his conclusion "that the defendants' loaves, without any bands or names upon or about them, were not so similar to the 'Creamalt' loaf as to be likely to deceive the ordinary purchaser, having some knowledge of the appearance of the 'Creamalt' loaf, or to constitute an instrument of fraud in the hands of the retail dealer," the following facts:

Upon the loaf of bread manufactured by the plaintiff was pasted a label, one and five eighths inches long and three quarters of an inch wide, containing the words,

Made with Milk and Malt
Creamalt
Reg. U. S. Pat. Off.
Geo. G. Fox Co.

The loaf manufactured by the plaintiff is described in the opinion.

Impressed upon the bottoms of the loaves offered for sale by the defendants were the words, "Best," or "Friend." "They were of about the same weight or size as the 'Creamalt' loaf, belonging to the same class of loaves, namely, the ten cent

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loaf designed by bakers for the grocery and other retail trade as distinguished from the restaurant trade. They had the same rounded and slightly flaring sides as the 'Creamalt' loaf. Their upper surface was also glazed as was that of the 'Creamalt' and other loaves commonly sold in this market. On the other hand, the defendants' loaves differed from the 'Creamalt' loaf in that their tops were less rounded and in that the ends of the defendants' loaves were square instead of round, and consequently their corners were square, or at an angle, rather than round. This difference gave the defendants' loaves taken as a whole, rather a different appearance from the 'Creamalt' loaf, because it impaired their oval shape, and in that way distinguished them from a loaf of which the most noticeable peculiarity was its oval shape."

About the central portion of each loaf of the defendants, before it left the factory, was wrapped a paper band about two and one eighth inches wide. The bands were not attached to the loaves and could easily be removed without defacing the loaves. Upon each band manufactured by the defendants in the first case was printed or engraved the following:

Best's
Rich in Cream
Finest Log Cabin Loaf Flavor
Malted.

The name "Friend's" appeared instead of "Best's" on the loaves manufactured by the defendant in the second case.

"The defendants' loaves, . . . except for slight differences in the labels, are substantially the same in appearance as those in question in [George G.] Fox [Co.] *vs.* Hathaway, [199 Mass. 99], but as the evidence presented in that case with regard to the similarity of the plaintiff's and the defendants' loaves may have differed in some respects from the evidence in these cases, I find, purely as matter of fact on the evidence before me, as follows: — The names 'Best' and 'Friend' stamped upon the bottoms of the defendants' loaves would not in themselves have been sufficient to distinguish their loaves from the 'Creamalt' loaf. They were in an inconspicuous position, were often wholly

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or partially illegible, and would not be likely to attract the attention of the ordinary buyer. The bands placed around the defendants' loaves would, if they remained upon the loaves while in the hands of the retail dealers, be sufficient to distinguish them from the 'Creamalt' loaf; but as they were not attached to the bread and could easily be removed by a dishonest retailer, they would not be an adequate means of distinguishing the loaves, provided they were not otherwise distinguishable in appearance, and provided it was the defendants' duty to distinguish them.

"But it seems to me that wholly apart from the names on the bottom of the defendants' loaves and the bands around them, the ordinary purchaser, having some knowledge of the appearance of 'Creamalt' bread, either from having bought it or from having seen advertisements and pictures of it, would have no difficulty in distinguishing the 'Log Cabin' from the 'Creamalt' loaves. Excluding the French and Vienna breads, most of the ten cent loaves sold in the retail stores have some points of resemblance. They all have somewhat rounded tops and flat bottoms. A large proportion have glazed tops. They are all of about the same weight. The prominent characteristics of the 'Creamalt' loaf were, as above stated, its oval contour, much rounded top and flaring sides, together with its more perfect glazing — the whole giving an appearance of size or bulk. While the 'Log Cabin' loaves had curved and flaring sides they had square ends and a less rounded top, and therefore lacked the distinct oval appearance of the 'Creamalt' loaf and did not give the same impression of large size. Nor did it appear that the gloss and color of the top of the 'Log Cabin' loaves were the same as those of the top of the 'Creamalt' loaf. Moreover, the label pasted on each loaf of 'Creamalt' bread and appearing in the advertised pictures of it served appreciably to distinguish it from the 'Log Cabin' and other ten cent loaves."

The plaintiff excepted to the master's report upon the following grounds among others:

"1. For that the master has not found, as requested by the plaintiff, that the public had learned to recognize the plaintiff's 'Creamalt' loaves by their general visual appearance."

"3. For that the master has not found that the defendants'

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loaves were so similar in appearance to the plaintiff's as to be likely to deceive the ordinary purchaser.

"4. For that the master has found that the defendants' loaves without any bands or names upon them were not so similar to the 'Creamalt' loaf as to be likely to deceive the ordinary purchaser having some knowledge of the appearance of the 'Creamalt' loaf, or to constitute an instrument of fraud in the hands of retail dealers.

"5. For that the master has found that the defendants' loaves were not so similar to the 'Creamalt' loaf as to be likely to deceive the ordinary purchaser having some knowledge of the appearance of the plaintiff's 'Creamalt' loaf."

"12. For that the master has not found, upon the pleadings and the facts reported, that the loaves of the defendants were so similar in appearance to the plaintiff's as to be calculated to deceive the ordinary purchaser and to make the loaves of the defendants an instrument of fraud in the hands of retail dealers."

The defendants filed numerous exceptions.

The cases were heard by *Pierce*, J., upon the exceptions to the master's report, and an order was made that the exceptions of all parties be overruled and a decree be entered dismissing the bills; and, by agreement of the parties, the cases were reported to this court for determination.

O. Mitchell, (*J. T. Brennan & James J. McCarthy* with him,) for the plaintiff.

G. W. Anderson, (*W. C. Rogers* with him,) for the defendants.

LORING, J. These bills are brought by the plaintiff in *George G. Fox Co.* v. *Glynn*, 191 Mass. 344, and in *George G. Fox Co.* v. *Hathaway*, 199 Mass. 99. The master in the case at bar has found (1) that the defendants began to sell the loaves here complained of "soon after the decree of the Superior Court of this County [referred to in these bills] dismissing the bill in the case of the *George F.* [*sic*] *Fox Company* v. *Hathaway*, was entered," and (2) that "The defendants' loaves here in question are, except for slight differences in the labels, substantially the same in appearance as those in question in *Fox* [*sic*] v. *Hathaway*"; but in the words of his report, (3) "Upon all the facts,

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as above stated and upon an inspection of the exhibits in the cases, I therefore find that the defendants' loaves, without any bands or names upon or about them were not so similar to the 'Creamalt' loaf as to be likely to deceive the ordinary purchaser, having some knowledge of the appearance of the 'Creamalt' loaf, or to constitute an instrument of fraud in the hands of the retail dealer." In *George G. Fox Co.* v. *Hathaway*, we found as a fact that the visual appearance of the loaf there in question, which was "substantially the same in appearance" as that in question in the two suits now before us, was likely to mislead the ordinary purchaser into thinking that the defendants' bread was the plaintiff's bread. We adhere to our former finding. The master was plainly wrong in the last of the three findings stated above, and the plaintiff's first, third, fourth and fifth exceptions to his report must be sustained.

The defendants contend that for two reasons this does not bring these two cases within the decision in *George G. Fox Co.* v. *Hathaway*, *ubi supra*. The first of these reasons is that it appeared in the Hathaway case "that the oval shape adopted by the plaintiff was uncommon, although not entirely novel, and that it was uneconomical, and less convenient and satisfactory generally for the cutting of slices for all kinds of uses than the shapes generally adopted. There was nothing to show that the defendants' business interests required the combination of this shape with the same size, color and general visual appearance that had become associated with the plaintiff's trade in this 'Creamalt' bread," while in the cases now before us it has been found as a fact that the oval-shaped loaf with its flaring sides and exaggerated rounding of the top is on the whole an advantageous loaf and for the following reasons: (1) It has an appearance of bulk and size which no other loaf of the same weight has and therefore purchasers who wish to get as much as possible for their money prefer it: (2) It has a handsome and attractive appearance: (3) Its rounded corners are less likely to be broken in transportation and the pans are more easily cleaned: (4) Although it is a fact that it is less adapted to being cut into uniform slices, that fact is of little importance in the "family trade," for which the plaintiff's and the defendants' loaves are primarily intended.

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The fact in the Hathaway case that the plaintiff's oval-shaped loaf was an uneconomical loaf and generally less convenient and satisfactory was spoken of because since that was the fact the case there presented was not a case of conflicting rights, but a case where the only explanation of the defendants' adopting the oval-shaped loaf was that they hoped to take advantage of the plaintiff's good will and to pass off their bread as the plaintiff's bread. There is nothing in that opinion which implies that if it had been found there as a fact that the oval shaped loaf was a desirable one the opposite result would have been reached. Not only that, but it is there stated in terms that the opposite result would not have been reached had that been the fact. After setting forth that the oval shaped loaf was an undesirable one and that there was nothing to show that the defendants' business interests required the adoption of it, this court went on to say: "The plaintiff had no exclusive right in any one of the features of the combination, and if the defendants had required the use of this combination for the successful prosecution of their business, they would have had a right to use it, by taking such precautions as would prevent deception of the public and interference with the plaintiff's good will."

The second ground on which the defendants seek to take the cases at bar out of the decision in the Hathaway case lies in the fact that the master has found that "If the fact is material . . . the defendants, perceiving that a loaf like the 'Creamalt' loaf, with rounded and flaring sides, suited the public taste or whim, and desiring to meet the competition of the 'Creamalt' loaf, decided to make a loaf having such rounded and flaring sides." The plaintiff has no exclusive right to make and sell bread having an oval shape, flaring sides and an exaggerated rounding of the top. And the defendants would have a right to make and sell bread which has that shape were it not for the fact that bread of that shape means to the public that it is made by the plaintiff. From this it follows (as was decided in *Flagg Manuf. Co.* v. *Holway*, 178 Mass. 83, and as was stated in that part of the opinion of this court in *George G. Fox Co.* v. *Hathaway* quoted above) that the defendants can use that shape of loaf if they take such precautions as will prevent their bread from being taken for the plaintiff's bread. The only precautions

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taken by them in these cases consist in stamping their names on the bottom of the loaves and placing bands around them. But the master has found in terms that these two means of distinguishing the defendants' loaves from the plaintiff's loaves "would not be an adequate means of distinguishing the loaves."

We are therefore of opinion that there is nothing in these cases which takes them out of the decision in *George G. Fox Co.* v. *Hathaway*, 199 Mass. 99, and that the twelfth exception to the master's report must be sustained.

A new defense, however, is set up, namely, that the plaintiff does not come with clean hands. The master has found (first) that the representation made by the plaintiff as to the ingredients of the bread is that it is made of milk and malt unless calling it "Creamalt" "may be taken to connote the use of pure cream." In our opinion it does not. Secondly, the master found that when the bill was filed "the plaintiff widely advertised 'Creamalt' bread as the 'new bread made with milk and malt.'" The findings of the master are that the plaintiff used malt as one of the ingredients of its bread because "it was also thought by the plaintiff to impart a desirable flavor to the bread," and that "the ingredients used in making 'Creamalt' bread were of good quality and were skilfully combined and baked, in accordance with a formula devised by the plaintiff's agents as the result of experiments." The bread therefore appears to have been made according to a new formula, and so might be fairly termed a new bread, although all the ingredients had been used in combination before in making bread. Thirdly. Up to and including the year 1906 the plaintiff did make misrepresentations of fact with respect to its "Creamalt" bread. It advertised that "It has twice the food value of any other bread." And there were other similar misrepresentations. But these advertisements had been stopped nearly a year and a half before these bills were filed on June 4, 1908. Although it is not so found in terms, we take it to be the fact on the findings made by the master that the increase in the plaintiff's daily sales from "about one hundred loaves" to "about six thousand loaves" may have come in some degree from these false representations. Notwithstanding that, the plaintiff has built up a large and remunerative business in selling a good bread which

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the public like, and the defendants have put upon the market an imitation of its loaves, adapted to use in deceiving that part of the public who had only a general knowledge and recollection of that which had been recommended to them, or which they had been accustomed to buy. The question we have to decide is whether the plaintiff who, for nearly a year and a half before the bill was filed, stopped all advertisements which were not true, is to be precluded from having the defendants enjoined from selling their bread as the plaintiff's bread because some of its former advertisements contained statements which were not true. In our opinion that would be going too far, and the only authorities we have seen are to that effect. *Moxie Nerve Food Co.* v. *Modox Co.* 153 Fed. Rep. 487. *Benedictus* v. *Sullivan, Powell & Co.* 12 R. P. C. 25.

The orders overruling the first, third, fourth, fifth and twelfth exceptions to the master's report taken by the plaintiff must be reversed and said exceptions must be sustained. The orders for decrees dismissing the bills must be reversed and decrees entered in favor of the plaintiff.

So ordered.

JOSEPH E. BROWN & others *vs.* CITY OF NEWBURYPORT.

Suffolk. March 29, 1911. — May 27, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Bills and Notes, Validity, *Bona fide* purchaser. *Municipal Corporations*, Officers and agents. *Contract*, Implied in law. *Words*, "Approval."

In determining whether, in the hands of a *bona fide* purchaser for value before maturity, a note of a city, having upon it certificates of various votes of the city council and of its committee on finance and a certificate of the city treasurer, is a valid obligation which can be enforced against the city, all that appears in writing or print upon the note may be taken as a part of it.

In the body of a promissory note of a city, signed in its behalf by its treasurer and countersigned by its mayor, was merely a promise to pay to the order of a certain person a certain amount of money. Appended to the note were certificates of the city clerk as to a vote of the city council, stating the terms upon which money in behalf of the city to a certain amount might be borrowed and notes therefor might be issued by the treasurer with the approval of a committee on finance, and as to a vote of that committee authorizing the mayor to approve notes in its behalf, a certificate of approval of the note by the mayor for the committee on finance and a certificate by the treasurer that the amount bor-

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rowed, inclusive of the note in question, was less than the limit set by the vote of the council. The certificate of the treasurer was false. The note was sold before maturity by the payee to a purchaser for value. *Held*, that the validity of the note, even in the hands of a *bona fide* purchaser, depended upon the matters stated on it, giving to each the force to which it was entitled, and not assuming that, because it was signed by the treasurer and countersigned by the mayor, the note was authorized and valid.

A vote of a city council authorizing and directing the city treasurer in anticipation of taxes "to borrow from time to time, with the approval of the committee on finance, a sum or sums" aggregating a certain amount of money, does not show an intention to confer upon the committee on finance a perfunctory commission to be exercised once for all at the beginning of the year, but places upon the members of the committee, acting upon their official responsibilities and having in view the public welfare, the duty to investigate and sanction according to their own independent judgments each separate borrowing made under the order, which duty cannot be delegated.

Official duties of municipal officers involving the exercise of discretion and judgment cannot be delegated.

Where, from certified copies of votes appended to a promissory note of a city, it appears that a vote of the city council authorized notes to be issued by the treasurer and required that each note should be approved by the entire committee on finance, which was composed of the mayor and seven members of the council, and that the committee on finance by a perfunctory vote attempted to delegate the duties and powers thus conferred upon it to the mayor for the entire year and that the note in question was approved "for the committee" by the mayor alone without other action by the committee, every holder of the note is charged with knowledge of the invalidity of the committee's action and of the fact that the note was issued without authority.

A city council authorized and directed the city treasurer in anticipation of taxes "to borrow from time to time, with the approval of the committee on finance, a sum or sums" aggregating a certain amount. The committee on finance was composed of the mayor and seven members of the council. It passed a vote "that the mayor and city treasurer be authorized to negotiate notes under the provisions of the order" of the council "from time to time as may be required." *Held*, that the vote of the committee was not within the powers and duties conferred upon them by the vote of the council, and that a note, executed by the mayor and treasurer in accordance with the vote of the committee and negotiated to a *bona fide* purchaser for value before maturity, did not bind the city.

Where a treasurer of a city, by means of a promissory note, which purported to be signed by him in behalf of the city, but which was invalid on its face, procures from one innocent of his fraud a check for a sum of money, deposits the check to the account of the city and immediately draws out the entire amount so deposited to pay another note fraudulently issued by him and to cover defalcations by him, the city is not liable in an action for money had and received by the signer of the check.

CONTRACT upon a promissory note set out in full in the opinion. Writ dated June 14, 1909.

In the Superior Court the case was submitted to *Richardson*, J., upon an agreed statement of facts. The judge found for the

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defendant and judgment was entered accordingly. The plaintiffs appealed.

The facts appear in the opinion.

J. L. Thorndike, (*H. Ware* with him,) for the plaintiffs.

A. Withington, for the defendant.

RUGG, J. This is an action upon a promissory note of the following tenor:

"$25,000. — Newburyport, Mass., April 13th 1906.

For value received, the City of Newburyport, by its Treasurer, promises to pay J. V. Felker City Treas., or order, Twenty-five thousand Dollars, in six months without grace, at the First National Bank of Boston

Approved for Committee on Finance, J. V. Felker, City Treasurer

No. 795 W. F. Houston Mayor W. F. Houston Mayor

In City Council, City of Newburyport, Mass. January 1, 1906.

Ordered, that for the purpose of procuring a temporary loan to, and for the use of the City of Newburyport, in anticipation of the taxes of the present municipal year, the City Treasurer is hereby authorized and directed to borrow from time to time, with the approval of the Committee on Finance, a sum or sums, in the aggregate not exceeding One hundred and Sixty thousand dollars, with renewals thereof, and to execute and deliver the Note or Notes of the City therefor, payable within one year from the time the loan is made, with interest thereon or Discounted at a rate not exceeding six per cent. per annum. The said debt or debts incurred by a loan or loans to the City under this order, are to be paid from the said taxes of the present municipal year.

In Common Council January 1 1906

Order adopted by yea and nay vote. Yeas 18, nays 0, absent 0, and sent up for concurrence.

J. Herman Carver Clerk

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In Board of Aldermen, January 1 1906

Order adopted in concurrence by a yea and nay vote. Yeas 7, nays 0, absent 0.

(Seal of city) George H. Stevens City Clerk.
Approved January 1 1906 W. F. Houston Mayor.
A True Copy Attest: George H. Stevens City Clerk.

City of Newburyport, April 13, 1906.

I hereby certify that the total amount borrowed under the above authorization, including Note No. 795 of this date, is Eighty five thousand dollars.

J. V. Felker Treasurer

In Committee on Finance, January 9th 1906

Ordered, that his Honor the Mayor be authorized to approve for the Committee on Finance, all Notes of the City of Newburyport duly negotiated on any loan made for and in behalf of the City.

Attest
George H. Stevens Clerk of the Committee.

[Endorsement on back]
J. V. Felker City Treas."

This note was the first of five numbered consecutively bearing the same date, aggregating $80,000 sold to the plaintiffs by the city treasurer of the defendant on the day of their date. The certificate of the city treasurer on each of the other four notes as to the amounts of indebtedness incurred under the order of the city council was increased by the face of each note and the aggregate of those preceding it. The city council and the committee on finance, which was composed of seven members of the city council and the mayor, passed respectively the two orders set forth on the note, and the committee on January 9, 1906, further voted "That the Mayor and City Treasurer be authorized to negotiate notes under the provisions of the order of the City Council passed January 1, 1906, from time to time as may be required." Between January 17, 1906, and April 13, 1906, Felker had negotiated under the authority of said order and

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votes notes aggregating $98,475 upon forms substantially the same as that here in question, and had properly entered the proceeds from the sales of said notes upon the books of the city. The proceeds of the five notes dated April 13th were used by Felker to pay a single note for $80,000, dated November 13, 1905, and made in the name of the city, which note was the latest of many fraudulently issued and used to cover a series of defalcations made by him as city treasurer during a period of about ten years. No action was taken by the city council except to pass the order, copy of which appears on the note, and no action was taken by the committee on finance respecting the note in suit, and no action whatever was taken by it under the authority of the order of January 1 except to pass the two votes on January 9 before recited. The sums embezzled by Felker were not entered upon the books of the city, and the blanks used for the fraudulent notes were torn from the end of the note book, while those used for legitimate purposes were taken in order from the front of the note book. No other city official knew of the fraud of Felker. The defendant resists liability on this note on two grounds: first, because it appeared from the face of the note that it was not approved by the committee on finance as required by the vote of the city council; and, secondly, because of over-issue on the ground that the limit of borrowing authorized was $160,000, and the notes of April 13, 1906, of which this was one, brought the total borrowed up to $178,475.

All that appears in writing or print upon the note may be taken as a part of it. The several certificates of the city treasurer and city clerk are not in such form, and the phrase of the note itself is not such, as to indicate an assertion of their truth by the mayor and city treasurer in signing the note. Their terms import plainly that they are independent declarations by different city officials intended to stand on their own merits. R. L. c. 27, § 9, required the notes of the defendant to be signed by its treasurer and countersigned by its mayor. In this regard the order did not follow the statute, but of course was subject by implication to its terms. So far as any recitals are concerned, which might bind the city touching notes, these are the officers inferentially designated by the statute as alone

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empowered to make them. We do not decide what might be the effect of a complete narration of facts, as a part of the note, attested by these two officers, which would show on its face a valid obligation binding upon the city. That is not the case before us. That point was left open by *Agawam National Bank* v. *South Hadley*, 128 Mass. 503, and has not since been decided by this court. We have merely a promissory note in common form without any recitals in its body, to which are appended several certificates. The signing by the mayor and treasurer of the note itself goes no further than the execution of the promise, and does not purport to be an authentication of the other statements upon the note. These derive all their strength from the signatures of the several officials affixed to them. The issuance of the note was not itself equivalent to any recital of the existence of necessary precedent facts. *Buchanan* v. *Litchfield*, 102 U. S. 278. *Hopper* v. *Covington*, 118 U. S. 148. The copy of the vote of the city council, which alone was empowered to authorize the issuance of the notes, is attested by the city clerk. This vote does not purport to empower any officer to make recitals. All that appears upon the note therefore are statements of the city clerk and clerk of committee and city treasurer in way of assurance to purchasers of the existence of certain facts. None of them are made in execution of any legal duty. It was said by Mr. Justice Gray in *Daviess County* v. *Dickinson*, 117 U. S. 657, at 664: "An officer's certificate of a fact he has no authority to determine is of no legal effect." It is only as to facts within the power of the officers to ascertain and determine that this statement can affect the city. *Bloomfield* v. *Charter Oak Bank*, 121 U. S. 121. *Northern Bank* v. *Porter Township*, 110 U. S. 608, 617. A city clerk has a duty and authority as to authentication of records. But there is no statute which clothes a city treasurer with the power or duty to determine and certify the outstanding indebtedness of the municipality. If such power can be inferred from the right to execute notes, then it inheres in the mayor and city treasurer, the signatures of both of whom are required to validate a city note, and not in either acting separately. Hence it is unnecessary to consider whether *Presidio County* v. *Noel-Young Bond & Stock Co.* 212 U. S. 58, 65, 66, and the cases there cited announced

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principles of law controlling in this Commonwealth, for there the recitals were in the body of the instrument and were signed by all the officers whose signatures were required to make valid the obligation. Its validity must therefore depend upon the matters stated on the note, giving to each the force to which each is entitled, and not covering them all with the blanket of authority of the city itself acting through the city treasurer and mayor as agents duly empowered to execute notes. The point to be decided is whether under this principle the city is concluded by what appeared upon the note, or whether enough appears there to show the validity of the note.

This requires an analysis of the several statements on the note. The order of the city council bounded the liability to which the city could be subjected under the statute. In this Commonwealth a municipality has now no inherent power to borrow money or to issue notes. It can incur debts only in the manner and within the limitations prescribed by the statutes, which have somewhat narrowed powers previously possessed. *Agawam National Bank* v. *South Hadley*, 128 Mass. 503, 505. A prerequisite to the borrowing of any money in anticipation of taxes by the defendant was an authorizing vote of the city council. R. L. c. 27, § 6. This note did not undertake to describe the effect of the authorizing vote, but set it out at length, so that every holder was charged with notice of its terms. The order itself was not strictly in compliance with the statute, in that it did not require the countersigning of the note by the mayor. This however was necessarily implied. Moreover, the mayor was a member of the finance committee, and thus indirectly his approval was required. It is to be observed that the city treasurer was not given an absolute and unqualified authority to negotiate the loan, but he was authorized only to borrow "from time to time with the approval of the committee on finance." This language shows a plain purpose to enable the borrowing to be made at different intervals of time. The collocation of the description of this duty, imposed on the finance committee, indicates that it was to be exercised whenever the borrowing took place, either from time to time or by a single loan. The crucial word to be construed is "approval." This word, like many others, has different meanings, depending upon

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the connection in which it is found and the subject matter to which it is applied. It is used here by a municipal legislative body in a formal order to express a supervisory power reposed in one of its sub-committees as a restraint upon the action of an executive officer of the city, which might serve the purpose of enlightening his judgment, controlling his discretion and limiting his opportunity for folly or dishonesty. It occurs in a vote relating to the borrowing of money for municipal purposes. This is no simple matter, but involves a high degree of skill in order to determine the time and conditions under which most favorable rates of interest and discount may be secured in the light of the actual financial necessities of the city. It does not manifest an intention to confer a perfunctory commission to be exercised once for all at the beginning of the year. That would be an idle ceremony, and would accomplish none of the results which the use of the language imports. The finance committee, as its name indicates and the ordinances of the defendant city provided, was the general legislative guardian of the financial affairs of the city. Approval, in this connection, means that the members of the finance committee, acting upon their official responsibilities and having in view the public welfare, shall investigate and sanction according to their own independent judgment, each separate borrowing made under the order. It implies reflection and sound business discretion as to each loan proposed. It did not confer a mere ministerial function, but imposed active and important prudential obligations. *Galligan* v. *Leonard*, 204 Mass. 202, 205. See cases collected in 4 Encyc. L. & P. 1228, *et seq.* The note shows by an attested copy of its vote how that committee undertook to perform the duty thus reposed in it, and hence every holder is charged with notice of the effect of its action. The vote plainly discloses that the members of the committee did not intend to exercise any individual judgment touching loans, but tried to delegate their authority of approval to the mayor. Official duties involving the exercise of discretion and judgment for the public weal cannot be delegated. They can be performed only in person. *Commonwealth* v. *Maletsky*, 203 Mass. 241, 246, and cases cited. *Hill* v. *Boston*, 193 Mass. 569, 573. *Commonwealth* v. *Smith*, 141 Mass. 135, 140. *Commonwealth* v. *Staples*, 191 Mass. 384,

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386. *Stoughton, Sharon & Canton* v. *Baker*, 4 Mass. 522, 530. *Attorney General* v. *McCabe*, 172 Mass. 417, 420. *Ruggles* v. *Nantucket*, 11 Cush. 433. *Day* v. *Green*, 4 Cush. 433. *Coffin* v. *Nantucket*, 5 Cush. 269, 272. *Blair* v. *Waco*, 75 Fed. Rep. 800. *Curtis* v. *Portland*, 59 Maine, 483. *Andover* v. *Grafton*, 7 N. H. 298. *State* v. *Hauser*, 63 Ind. 155. *Birdsall* v. *Clark*, 73 N. Y. 73.

The certificate of the mayor upon the face of the note in these words, "Approved for Committee on Finance," read in connection with the vote of the committee on finance, denotes clearly that the mayor was undertaking to exercise merely the power delegated to him by the finance committee, and was not expressing (what did not exist in fact) an approval resting upon the actual exercise of the power conferred upon the committee by the order. It follows that this note showed upon its face its infirmity, in that it did not comply with the terms of the order by which alone it could acquire vitality. A note thus manifesting its invalidity on its face is not binding, even in the hands of a *bona fide* purchaser for value before maturity, either under our own decisions or under the general current of authority elsewhere. Nothing is better settled than that the holder of a note is held to a knowledge of the recitals it contains and is bound by their legal effect. *Agawam National Bank* v. *South Hadley*, 128 Mass. 503. *Lowell Five Cents Savings Bank* v. *Winchester*, 8 Allen, 109. *Benoit* v. *Conway*, 10 Allen, 528. *Abbott* v. *North Andover*, 145 Mass. 484. *Dickinson* v. *Conway*, 12 Allen, 487. *Lake County* v. *Graham*, 130 U. S. 674. *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, 257. *Nesbit* v. *Riverside Independent District*, 144 U. S. 610. *Sutliff* v. *Lake County Commissioners*, 147 U. S. 230. *Daviess Co.* v. *Dickinson*, 117 U. S. 657.

It is urged, however, that as the only infirmity suggested in this regard touches the authority of the treasurer to issue the note under the order of the city council, the holder is not confined to the evidence on the face of the note, but may find that authority anywhere, if it exists, and that ample authority is found in the second vote of the finance committee of January 9, 1906, quoted above, which purported to empower the mayor and city treasurer to "negotiate" all the notes under the city council order. It is said that thus, "so far as the committee had

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jurisdiction, it by one stroke gave the city treasurer coupled with the mayor authority to issue the notes to the limit named." *Citizens' Savings Bank* v. *Newburyport*, 169 Fed. Rep. 766, 772. But according to the construction which we have given to the order of the city council in respect to the duty thereby imposed on the finance committee, its vote, passed long before the present note was considered, and, so far as appears, before any specific borrowing was contemplated and eight days at least before any note was in fact negotiated, was no valid performance of the function required of them. It appears not to be on its face, because it does not profess by its terms to be the exercise of any judgment or discretion on the part of the committee. It is not an "approval" by the committee of any particular borrowing, and it was not made "from time to time" as the notes were issued. It does not purport by its terms to be an approval of an act of borrowing performed or proposed by the treasurer, but to be an antecedent authorization of an act not yet initiated. It attempts to authorize these officers to "negotiate" notes, which means to perform the entire transaction of asking for bids or ascertaining the discount by private inquiry, and deciding upon the amounts, the rate and time on which they should be given. *Everson* v. *General Accident, Fire & Life Assurance Co.* 202 Mass. 169, 172. The committee was not clothed by the order with power to authorize the city treasurer to act. His authority to borrow could flow only from the city council, and its order conferred that authority, and did not undertake to delegate it to its committee. But it conferred the authority upon the treasurer, subject, as before pointed out, to the limitation that the finance committee must approve his exercise of authority before it could be quickened with the legal breath of life. The effect of the vote now relied on was simply to surrender to the mayor and city treasurer the trust reposed in the committee. But this being an official responsibility involving discretion, could not be delegated. This is not a narrow or technical definition of words, but a natural interpretation according to their common meaning. So far as we are able to perceive, it is the only construction which gives force to all language of the order of the city council or renders it capable of accomplishing practical results in the administration of the affairs of the city. It follows

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that this vote was ineffectual to constitute a compliance with the order of the city council as to the finance committee. The note was therefore not legally issued.

The considerations here stated are so conclusive to our mind as to compel us to a different conclusion from that reached by the United States Circuit Court of Appeals for this district in *Citizens' Savings Bank* v. *Newburyport*, 169 Fed. Rep. 766, in which a *certiorari* has been refused by the Supreme Court of the United States, 215 U. S. 598, which involved the other notes issued on April 13, 1906.

It becomes unnecessary to consider whether this note was an overissue.

The liability of the defendant on the count for money had and received is also urged. The check, with which this note and the others of even date was bought, was made to the order of the defendant, deposited in its bank account, and immediately used by the treasurer to cover his defalcations. If the note had been valid in the hands of the holder, the purchaser would not be answerable for the application of the purchase money. But this note was not a binding obligation of the defendant. So far as the city was concerned, the check was a voluntary payment without its knowledge. The fact that it was deposited in its bank account is not enough to charge the defendant with liability. This point is concluded against the plaintiff by *Railroad National Bank* v. *Lowell*, 109 Mass. 214, and *Agawam National Bank* v. *South Hadley*, 128 Mass. 503. It is the application of a widely prevailing principle. *Craft* v. *South Boston Railroad*, 150 Mass. 207. *Foote* v. *Cotting*, 195 Mass. 55. *Boston Electric Co.* v. *Cambridge*, 163 Mass. 64. Even direct benefits conferred do not necessarily impose liability upon an incorporated subdivision of government. *Adams* v. *County of Essex*, 205 Mass. 189. But here no benefit was conferred on the defendant.

This is not a case of issue of bonds valid on their face but void by reason of lack of statutory or other authority, where all the acts done have been approved in fact by proper officers of the city, and where the city has received and used the money with the authority of its responsible officers (see *Louisiana* v. *Wood*, 102 U. S. 294), but a case where both the plaintiffs and

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the city have suffered by the criminal acts of one person, who put forth a note invalid on its face and misappropriated the proceeds.

Judgment for the defendant affirmed.

FRANK McKAHAN & another *vs.* AMERICAN EXPRESS COMPANY.

Suffolk. December 7, 1910. — May 16, 1911.*

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Carrier, Of goods or animals. *Damages*, Limitation. *Conversion*. *Contract*, Implied in law. *Express Company*.

Where a carrier of goods or animals makes a material departure from the method of transportation, this, like a deviation from the designated route, avoids the express contract of carriage and all provisions as to limitation of damage contained in it, at least at the election of the shipper.

Where an express company makes a contract in writing for the transportation of a certain number of horses from a place in Indiana to a city in this Commonwealth in a time not to exceed thirty-six hours, and the shipper agrees that an attendant shall accompany and take charge of the horses, the express company furnishing free transportation for the attendant, and the shipper by the same contract declares the value of the horses to be $75 each and agrees that the express company shall in no event be liable for damages for injury to any of the horses in excess of the sum declared by the shipper to be the value thereof, if the express company during the transportation separates the horses from their attendant furnished by the shipper, against the attendant's objection, and in consequence the horses are injured by detention in the cars for a period of forty-four hours without being fed or watered, the carrier's departure from the agreed method of transportation displaces the contract of carriage and releases the shipper from all limitations upon the carrier's liability which he agreed to therein, so that he is entitled to recover from the carrier full compensation for his loss, it here not being necessary to decide whether his proper remedy is in tort for the conversion or upon an implied contract arising from the fact of shipment.

LORING, J. This is an action for damages to horses carried by the defendant from La Fontaine, Indiana, to Boston in this

* The opinion in this case was withdrawn on an application for a rehearing. This was denied on June 19, 1911, when the opinion was returned to the Reporter.

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Commonwealth. The plaintiffs had signed an agreement extending to thirty-six hours the time during which the horses could be carried without unloading. But they were carried for forty-four hours and the damage done to them was caused by that. The defendant admitted its liability and defended on the ground that by the terms of its contract with the plaintiffs it was liable for $12.50 only.*

It is stated on the face of the contract that the shipper was offered alternative rates to be charged for the carriage of the horses proportioned to their value (such value to be fixed and declared by the shipper), which rates were stated in the tariff also stated on the face of the contract. It is stated further on the face of the contract that for the purpose of availing themselves of the alternative rates to be charged for the carriage of the horses here in question the plaintiffs had declared the value of them to be $75 each. Not only did it appear that the rate was based on each horse being valued at $75, but in addition the following clause was contained in the agreement: "The shipper hereby releases and discharges the express company from all liability for delay, injuries to or loss of said animals from any

* In the Superior Court the case was tried before *Harris*, J. The plaintiffs made an offer of proof of a statement of a horse dealer, who had examined the horses, showing that seven of the plaintiffs' twenty-eight horses transported by the defendant were injured, and tnat these seven horses sold for $501 less than they would have sold for if uninjured. By this statement it appeared that only one of the horses sold for less than $75, and that he sold for $62.50. The defendant objected to this offer of proof and objected to the introduction of any evidence for the purpose of assessing damages excepting such as tended to show the amount that each horse sold for less than the amount of $75, the defendant contending that under the contract of carriage the declaration of the value of the horses at $75 limited the liability of the defendant to the difference between the value declared in that contract and the amount under the declared value for which any of the horses were sold, so that the only damage which the plaintiffs could recover was $12.50. The plaintiffs, among other requests, asked the judge to rule that "If the contract between the plaintiffs and the defendant was broken by the defendant, by separating the horses from their attendant, without the consent of the attendant, then all the clauses in the contract tending to limit the defendant's full liability as a common carrier become inoperative and ineffectual." By agreement of the parties the judge ordered a verdict for the plaintiffs upon the declaration and reported the case, reserving the question of damages for determination by this court.

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cause whatever, unless such delay, injury or loss shall be caused by the negligence of the agents or employees of the express company, and in such event the express company shall be liable only to the extent of actual damage to the animal or animals injured, which shall in no event exceed the sum herein declared by the shipper to be the value thereof; and for the purpose of ascertaining or assessing such damage, whether the same be a total or a partial loss, the value of said animals as herein declared by the shipper shall be conclusively deemed to be the true value thereof." It was provided by the contract that "The shipper agrees . . . to cause the necessary attendants to accompany and take charge of said animals, the express company furnishing free transportation for the attendants who have signed the attendant's contract appended hereto."

When the car containing the horses in question arrived at Buffalo the agent of the express company told the attendant that the train on which the horses naturally would go to Albany was "heavily loaded," and that they wished to put the car on the "Limited" which was "running light that day." The defendant's agent also told the attendant that if that was done he, the attendant, would have to pay a fare to Albany and that at Albany the car containing the horses would be put on the usual train for Boston. The attendant said that he would not pay the extra fare and insisted upon the car going on the usual train. Against his protest and without his knowledge the car was put on the "limited" train and he took the usual train. The usual train was late in getting into Albany and had not arrived when the time came for the train from Albany to Boston to start. Although the attendant had not arrived the horses were sent forward on the usual train to Boston and arrived at Boston in the night at an hour not stated in the report. The attendant arrived in Boston at about five o'clock in the morning and found the horses still in the car. He succeeded in having them unloaded between seven and eight o'clock. Although the report does not state the hour when the horses arrived, it does appear that they were unloaded eight hours after the expiration of the thirty-six hours to which the plaintiffs had extended the time for their carriage without unloading. The plaintiffs' evidence showed "that the cause of the injury to the horses was their

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detention in the cars without being fed or watered from the time they left La Fontaine, Indiana, between eleven and twelve o'clock on Saturday until the following Monday morning," and this must be taken to have been admitted by the defendant's admission of its liability.

It is settled as matter of authority that a deviation by a carrier from the route described in a contract of shipment makes him liable as an insurer of the goods shipped although the contract of shipment exempts him from liability under the circumstances (apart from the deviation) under which the goods were lost or damaged. *Waltham Manuf. Co.* v. *New York & Texas Steamship Co.* 204 Mass. 253. *Davis* v. *Garrett*, 6 Bing. 716. *Joseph Thorley Limited* v. *Orchis Steamship Co.* [1907] 1 K. B. 660. *Hostetter* v. *Park*, 137 U. S. 30, 40. *Constable* v. *National Steamship Co.* 154 U. S. 51, 66. *Maghee* v. *Camden & Amboy Railroad Transportation Co.* 45 N. Y. 514. *Hand* v. *Baynes*, 4 Whart. 204. *Crosby* v. *Fitch*, 12 Conn. 410. *Georgia Railroad* v. *Cole*, 68 Ga. 623. *Phillips* v. *Brigham, Kelly & Co.* 26 Ga. 617.

It is further settled as matter of authority that the same is true where there has been a departure from the method (including mode and manner) of transportation agreed upon. In *Goodrich* v. *Thompson*, 44 N. Y. 324, another steamship was substituted for the one agreed upon. See also in this connection *Robertson* v. *National Steamship Co.* 139 N. Y. 416, 419; *Dunseth* v. *Wade*, 2 Scam. 285, 289. The goods in question in *Robinson Bros. & Gifford* v. *Merchants' Despatch Transportation Co.* 45 Ia. 470, and in *Stewart* v. *Merchants' Despatch Transportation Co.* 47 Ia. 229, were shipped to be carried through in the same car, but were unloaded and put into a warehouse during transit and there burned. The carrier was held liable although by the contract he was exempt from loss by fire. *Galveston, Houston & Henderson Railroad* v. *Allison*, 59 Tex. 193, was the case of a similar shipment. There the goods shipped were melons injured by heat and decay from which the contract exempted the carrier from liability. But the melons had been transferred into other cars, and for that reason the carrier was held liable. In *Merrick* v. *Webster*, 3 Mich. 268, the goods were shipped to be carried "by sail on the lake" under a contract which exempted the carrier

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from loss from all dangers of the lakes. The goods were carried on a steamship, were lost in a collision and the carrier was held liable. In *Hunnewell* v. *Taber*, 2 Sprague, 1, the goods shipped consisted of oil in casks. The carrier agreed that the oil was "to be wet twice a week," and the shipper agreed that the carrier should "not [be] accountable for leakage." The oil not having been wet it was held that he was liable. For a similar case see *Grand Trunk Railway* v. *Fitzgerald*, 5 Canada, S. C. 204, 208. And see in this connection *Hastings* v. *Pepper*, 11 Pick. 41.

This principle has been applied in England in two cases (*Sleat* v. *Fagg*, 5 B. & Ald. 342; *Balian & Sons* v. *Joly, Victoria, & Co.* 6 T. L. R. 345) to make a carrier liable for the actual value of the goods shipped in spite of a stipulation in his contract with the shipper that the value should not be taken to exceed a sum therein named. *Sleat* v. *Fagg* was a case where the goods were shipped to go by one mail coach and in fact were sent by another. *Balian & Sons* v. *Joly, Victoria, & Co.* was a case where goods shipped for carriage from Lagos in Thessaly to London in the Mabel were in fact carried to Smyrna in the Mabel, there transferred to a Cunard steamship, carried in her to Liverpool and from Liverpool to London by rail.

The simplest class of cases, in which it has been held that a deviation from route or a departure from method of transportation prevents the carrier from setting up a clause in the contract between him and the shipper exempting him from liability under the circumstances under which the goods were lost or damaged, are those where the deviation or departure was the proximate cause of the loss. Such was the case in *Hand* v. *Baynes*, 4 Whart. 204, where the goods were shipped from Philadelphia to Baltimore by canal and were lost at sea outside the capes; and in *Hunnewell* v. *Taber*, 2 Sprague, 1, where the casks of oil leaked because not wet down as agreed. The principle has also been applied in cases where it was not possible to say that the deviation or departure was the proximate cause of the loss but the loss occurred during the continuance of the deviation or departure. *Sleat* v. *Fagg*, 5 B. & Ald. 342, is an example of a case of this class. But the principle was applied in *Joseph Thorley Limited* v. *Orchis Steamship Co.* [1907] 1 K. B. 660, in

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a case where the deviation was not the proximate cause of the damage done to the goods shipped and where it did not occur while the deviation was in effect. In that case the deviation had come to an end before the damage was done and there was no connection between the deviation and the damage. The goods in question in *Joseph Thorley Limited* v. *Orchis Steamship Co.* were locust beans carried in the defendant's steamer from Limassol to London. While the beans were being unloaded in London they were damaged by being mixed with a poisonous earth, called terra umber, which had been carried in the steamship as ballast. By the terms of the bill of lading the defendant was exempted from all liability for negligence (*inter alia*) in unloading the beans. England is a jurisdiction in which such a contract is valid, and it was assumed that the contract in question in that case was valid. But the defendant was held liable because in proceeding from Limassol to London there had been a deviation from the route described in the bill of lading. The route described was from Limassol to London, while the steamship in fact proceeded from Limassol to a port in Asia Minor, thence to a place in Palestine, thence to Malta, and from there to London. The case was decided on the principle suggested by the Master of the Rolls (Lord Esher) in *Balian & Sons* v. *Joly, Victoria, & Co.* 6 T. L. R. 845. In that case Lord Esher, after stating that it was not necessary to lay down all the consequences of a deviation by a carrier from the voyage contracted for, said: "It might be that the true view was that the deviation made the voyage actually carried out a different voyage from beginning to end from that to which the bill of lading applied, and that therefore the whole bill of lading was gone. If that was so it might be that the fact of shipment would give certain rights to the ship owner and to the shipper. It might be that what was agreed upon before the bill of lading would remain. Therefore the freight would remain. The ship owner as a carrier would have a lien for the freight. It was not necessary, however, to say whether that was so, though he inclined to take that view." *Joseph Thorley Limited* v. *Orchis Steamship Co.* was decided on the principle established by the case of *Balian & Sons* v. *Joly, Victoria, & Co.* 6 T. L. R. 845. It is not altogether clear from the judgments delivered in that case by Col-

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lins, M. R., and Fletcher Moulton, L. J., whether they intended to hold that the deviation had the effect of displacing the whole contract or that the carrier had incapacitated himself from setting up the exemption clause because the duty not to deviate was a condition precedent to that clause as a contract by the shipper. The latter view is supported by the decision in *Pavitt* v. *Lehigh Valley Railroad*, 153 Penn. St. 302. In that case it was held that the carrier could set up a failure by the plaintiff to make a claim within the time specified in the bill of lading, although there had been a deviation. But we are of opinion that the principle put forward by Lord Esher in *Balian & Sons* v. *Joly, Victoria, & Co.* is the true one and that the effect of a deviation is to do away with the express contract altogether, — at least at the election of the shipper. In other words the breach of the express contract of shipment (which takes place when there is a deviation from route or departure from mode, method or manner of transportation) is such a breach on the part of the carrier that the shipper can rescind the express contract of shipment on the principle acted upon in *Amos* v. *Oakley*, 131 Mass. 413, *Brown* v. *Woodbury*, 188 Mass. 279, and *Long* v. *Athol*, 196 Mass. 497.

It is not necessary to decide in the case at bar on what ground the shipper is to recover when the express contract has been thus wholly displaced. It was suggested by Lord Esher in *Balian & Sons* v. *Joly, Victoria, & Co.* that in such a case the shipper recovered on an implied contract arising out of the fact of shipment. On the other hand it was suggested by Holroyd, J., in *Sleat* v. *Fagg*, 5 B. & Ald. 342, 349, that in such a case the carrier had been guilty of a conversion of the goods and was liable in trover, but that that was not his only remedy. Decisions to the effect that in such a case the carrier is liable in trover for a conversion were made in *Georgia Railroad* v. *Cole*, 68 Ga. 623, and *Phillips* v. *Brigham, Kelly & Co.* 26 Ga. 617. The decision in the last case was put on the authority of *Wheelock* v. *Wheelwright*, 5 Mass. 104, where it was held that, if the defendant hires a horse to go to A and drives him to B, he is guilty of conversion. The defendant has not put forward the claim that if the whole original contract in the case at bar was displaced by the departure from the method of transportation

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agreed upon, the plaintiffs ought to pay the full rate and not the alternative rate based upon each horse being valued at $75. Therefore it is not necessary to decide this question.

In the case at bar the shipper's agreement that the horses were to be valued at $75 each was plainly based upon the risks incident to the transportation agreed upon, namely, transportation of the horses in care of an attendant. The breach by the carrier of its agreement to transport the horses in the care of an attendant was the proximate cause of the loss which occurred; and this case could be decided on the ground that it could not have been the intention of the parties to the original contract of shipment that the shipper should be held to his agreement as to the sum at which the horses were to be taken in case the carrier did not transport them in care of an attendant. But we are of opinion that the rule as to deviation from route and departure from method of transportation rests upon the broader ground that in such case the original contract is wholly displaced, at least at the election of the shipper, and we prefer to place our decision on that doctrine.

We construe the report to submit the question to us without regard to the pleadings. The plaintiffs seek to recover damage done to the horses and not the value of them. Even if trover is the shipper's only remedy, the amount to which the plaintiffs would be entitled in the case at bar is the value of the horses when converted less their value when re-delivered to the plaintiffs; and the same result is reached if a new contract is brought into being, implied from the fact of shipment.

By the terms of the report the entry must be judgment for the plaintiffs for $501 with interest from the date of the writ.

So ordered.

The case was argued at the bar in December, 1910, before *Knowlton*, C. J., *Morton*, *Loring*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

E. R. Anderson, for the plaintiffs.

A. M. Pinkham, for the defendant.

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EDWARD F. KEATING *vs.* BOSTON ELEVATED RAILWAY COMPANY.

RICHARD W. KEATING (afterwards by amendment BRIDGET KEATING, administratrix,) *vs.* SAME.

Suffolk. January 11, 1911. — June 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Negligence, In use of highway, Street railway. *Survival of Actions*. *Words*, "Damage to the person," "Damage to personal property."

If the driver of a two-horse covered wagon, when proceeding along a highway on a winter evening at the right hand side of two parallel street car tracks, finds that the right rear wheel of the wagon has caught in a cradle hole or rut two inches deep, and, being too near the curbstone to pull out on the right, he turns his horses to the left to pull the wagon out of the hole, and if, just before he turns his horses to the left, he looks both ways on the tracks for an approaching car, sees none coming on the nearer track and on the farther track sees the headlight of a car about one thousand yards or three quarters of a mile away, and if, after two unsuccessful attempts to pull the wagon out of the hole, he rests his horses for a minute or so and then turns them still more to the left so that they make an angle of ninety degrees with the wagon and are across the nearer track, and he then stands up and urges the horses and "chases" them forward, and the horses move ahead across the farther track, and the driver then looks and sees the approaching car only eighteen feet away, moving at the rate of fourteen miles an hour, and succeeds in pulling the horses out of the way, but the car strikes the right forward wheel, throwing the driver from his high seat to the ground, in an action by the driver against the corporation operating the street railway for his injuries thus caused, where there is evidence of the defendant's negligence, he has a right to go to the jury on the question whether he was in the exercise of due care.

Under R. L. c. 171, § 1, as at common law, an action by a father for the loss of the services of his minor son and expenses for medical attendance, incurred by reason of personal injuries to the plaintiff's son caused by the defendant's negligence, does not survive.

An action of tort for "damage to the person," which survives under R. L. c. 171, § 1, is an action for damage to the person of the decedent himself, and does not include an action for expenses incurred by the decedent by reason of damage to the person of his minor son.

An action of tort for "damage to . . . personal property," which survives under R. L. c. 171, § 1, is an action for damage to specific property, and does not include an action for the reduction of the decedent's property in consequence of paying doctor's bills incurred by him to cure his minor son when injured by the defendant's tortious act.

TWO ACTIONS OF TORT, the first by a minor for personal injuries sustained on January 31, 1907, on Western Avenue in

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that part of Boston called Brighton, when the plaintiff was thrown from the high seat of a two-horse wagon in which he was driving by its being run into by an electric car of the defendant, and the second by the father of the plaintiff in the first case for the loss of his son's services and for expenses incurred by reason of his injuries. Writs dated March 30, 1907.

Before the trial Richard W. Keating, the original plaintiff in the second case, died, and Bridget Keating, the administratrix of his estate, was admitted as plaintiff to prosecute that action. In the Superior Court the cases were tried together before *Brown*, J. After the plaintiffs' opening, the defendant moved that the second cause of action be dismissed on the ground that the cause of action did not survive the death of the original plaintiff.

The facts which appeared in evidence are stated in the opinion. At the close of the evidence the defendant, without waiving its motion to dismiss the second action, asked the judge to order a verdict for the defendant in each case on the ground that upon all the evidence the plaintiff in the first case was not in the exercise of due care; and that upon all the evidence the defendant was not negligent. It was thereupon agreed by the parties that in order to avoid a new trial the cases should be submitted to the jury and then reported by the judge to this court.

The jury returned a verdict for the plaintiff in the first action in the sum of $400, and for the plaintiff in the second action in the sums of $200 for loss of services and $100 for medical expenses.

The judge reported the cases for determination by this court, with the following stipulation: If there was no evidence from which the jury might find that the plaintiff in the first action was in the exercise of due care, or that the defendant was negligent, judgment was to be entered for the defendant in each case. If there was evidence from which the jury might find that the plaintiff in the first case was in the exercise of due care and that the defendant was negligent, judgment was to be entered on the verdict in the first case; and judgment was to be entered on the verdict in the second case unless the cause of action for loss of services or medical expenses or either of them, did not survive the death of the original plaintiff. If the action for loss of

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services survived and that for medical expenses did not, or *vice versa*, judgment was to be entered for the plaintiff for $200 or $100, as the case might be. If neither cause of action survived, judgment was to be entered for the defendant.

The case was argued at the bar in January, 1911, before *Knowlton*, C. J., *Loring*, *Braley*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

F. R. Mullin, (*P. F. Spain* with him,) for the plaintiffs.

F. M. Ives, for the defendant.

LORING, J. The plaintiff in the first case was driving a two-horse covered wagon along Western Avenue in Brighton, at about eight o'clock P. M. in the month of January, when the right rear wheel "caught in a cradle hole or rut about two inches deep." His right wheels were about three feet from the curb on the right side of the street and his left wheels were within three feet of the southerly rail of the inbound track of the defendant corporation. To the left of the inbound track there was an outbound track. The plaintiff found that he was too near the curbstone to pull out to the right, so he turned his horses to the left to pull the wagon out of the hole or rut. Just before he turned them to the left he looked both ways for an approaching car or cars. He saw none coming on the inbound track but he did see on the outbound track the headlight of the car which finally ran him down, about one thousand yards or three quarters of a mile away. When he first turned the horse to the left they were at an angle of forty-five degrees to the wagon, and they were on the inbound track. He then urged them forward, but they did not pull the wagon out of the rut. Then he rested them for a minute or so. Then he turned them still more to the left so that they made an angle of ninety degrees to the wagon, and that brought the horses across the inbound track. He then "stood up and urged and 'chased them' forward" and "the horses moved ahead across the outbound track, straightening the team out after them, and when the front wheels of the wagon were in the middle of the outbound track" "he looked and saw the car eighteen feet away." He did not have time to jump, but he succeeded in pulling the horses out of the way and the car struck the right forward wheel of the wagon, throwing him to the ground. He testified that he

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thought four or five minutes elapsed between the time when he looked the first time and the time when he was struck, or when he looked just before he was struck. The only direct evidence as to the speed of the car showed that it was going at the rate of fourteen miles an hour.

In *Seele* v. *Boston & Northern Street Railway*, 187 Mass. 248, it was held that a plaintiff was guilty of contributory negligence who drove for three quarters of a mile alongside of the defendant's tracks after looking to see whether a car was coming, and then turned and drove across them without looking again. The same result was reached in *Tognazzi* v. *Milford & Uxbridge Street Railway*, 201 Mass. 7, where the plaintiff looked to see whether a car was coming; seeing none, he drove for three hundred feet alongside the tracks, and then turned and drove across them without looking again. In that case there was evidence that there was a clear view of the track for "several hundred feet."

In our opinion the case at bar is taken out of those decisions by the fact that the plaintiff here saw the car and that the car was then one thousand yards to three quarters of a mile away. After seeing that the car was then at that distance away, the plaintiff concentrated his attention upon extricating his wagon from the rut in which it was stalled for a period of time which he testified was four or five minutes. The jury would be warranted in not taking his testimony as to the intervening time literally, in inferring that he originally thought that he had time to extricate the wagon from the rut and get across before the car reached him, and in finding that he became so engrossed in what he was doing that without being guilty of negligence he kept on with those endeavors without looking again until just before he was struck. We are therefore of opinion that the presiding judge was right in submitting the first case to the jury. See in this connection *McCrohan* v. *Davison*, 187 Mass. 466; *Murphy* v. *Boston Elevated Railway*, 204 Mass. 229; *O'Brien* v. *Lexington & Boston Street Railway*, 205 Mass. 182; *Hatch* v. *Boston & Northern Street Railway*, 205 Mass. 410.

The second action was for loss of services and for doctors' bills incurred by the father of the plaintiff in the first action. A father still has an action for doctors' bills paid or incurred by

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him for the injuries done to his minor son by the tortious act of the defendant. But such an action is a personal action which did not survive at common law. See note to *Lane* v. *Wheatley*, 1 Saund. 216; *Kearney* v. *Boston & Worcester Railroad*, 9 Cush. 108, 109; *Norton* v. *Sewall*, 106 Mass. 143, 144. And it does not survive under our statute as to the survival of actions. R. L. c. 171, § 1. It is not an action of "tort . . . for . . . damage to the person." That is confined to damage to the person of the decedent and does not include damage to the pocket of the decedent because of damage to the person of another. See *Hey* v. *Prime*, 197 Mass. 474, and cases cited. Although a broader construction was given in *Mulvey* v. *Boston*, 197 Mass. 178, to similar words in a statute of limitations. Nor is it an action "for damage to . . . personal property." That "does not apply to mere impoverishing of a man's estate generally, but requires that damage to some specific property should be alleged and proved." *Cutter* v. *Hamlen*, 147 Mass. 471, 472.

The result is that by the terms of the report the entry in the first action must be judgment on the verdict, and in the second action judgment for the defendant.

So ordered.

MAUDE M. WELLS *vs.* PERCY D. WELLS.
SAME *v.* SAME.

Suffolk. March 10, 1911. — June 19, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Judgment. Decree. Marriage and Divorce. Evidence, Of judgment of another State. *Practice, Civil,* Hearing by judge without jury, Conduct of trial: reopening of hearing.

A decree of a court of another State for the payment of a fixed sum of money found to be due and payable at the date of the decree to a wife for the past support of herself and her minor child is to be regarded, *prima facie* at least, as a final decree, although an order for future payments as a provision for future support, being liable ordinarily to modification at any time, is subject to the control of the court which made the order and so is not a final order for the payment of a fixed sum.

A court of Michigan having jurisdiction of the parties in chancery proceedings granted a divorce to a wife and ordered that the husband pay her a certain

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fixed sum each month for five years "as permanent alimony," that during a part of the year a minor child of the parties should be with his mother and during the rest of the time with a grandmother, the mother of the husband, and that, while the child was with the grandmother, the husband should pay for his support. The husband became in arrears in the payment of the fixed alimony and, the grandmother dying, the wife took exclusive custody of the child and paid out sums for his support. Thereupon, over two years after the original decree of divorce, upon petition of the wife, the Michigan court made a decree determining the amount of alimony due in arrears, "allowing" a certain sum to the wife "for schooling and medical attendance upon said child . . . to this time" and ordering execution against the husband for both sums, and the wife brought an action upon the decree in this Commonwealth, at the hearing of which by a judge without a jury the statutes of Michigan and decisions of the Supreme Court of Michigan were introduced in evidence, as well as testimony of a qualified expert that the decree of the Michigan court was a "final decree." The judge found for the plaintiff, and this court, after a review of the evidence including the decisions of the Michigan Supreme Court, *held*, that the finding was warranted by the evidence.

A court of Michigan having jurisdiction of the parties in chancery proceedings granted a divorce to a wife and ordered that the husband pay her a certain fixed sum each month for five years "as permanent alimony," that during a part of the year a minor child of the parties should be with his mother and during the rest of the time with a grandmother, the mother of the husband, and that, while the child was with the grandmother, the husband should pay for his support. The husband became in arrears in the payment of the fixed alimony, and, the grandmother dying, the wife took exclusive custody of the child and paid out sums for his support. Thereupon, over two years after the original decree of divorce, upon petition of the wife, the Michigan court made a decree determining the amount of alimony due in arrears, "allowing" a certain sum to the wife "for schooling and medical attendance upon said child . . . to this time" and ordering execution against the husband for both sums, and the wife brought an action upon the decree in this Commonwealth, at the hearing of which by a judge without a jury it appeared that the only notice to the defendant of the pendency of the petition for the decree which was the subject of the action in this Commonwealth was by a notice to one who had been his counsel in the original divorce proceedings, and there was undisputed evidence introduced by the defendant that, immediately after the original decree in the divorce proceedings, the authority of such counsel had been terminated, although his appearance had not been withdrawn from the court docket. There was testimony of a qualified expert for the plaintiff as to the law of Michigan, which was controverted, that "in a case in chancery an appearance continued indefinitely." The judge ruled that, "upon the undisputed evidence in the case, the decree of the Michigan court . . . is entitled to full faith and credit under the United States Constitution." The defendant alleged exceptions and contended that on the undisputed evidence there was no proper service upon the defendant of notice of the petition upon which the decree sued on was based. *Held*, that the petition was not a new or original proceeding, but was incidental to the original divorce suit, and that, the defendant having been properly before the court originally, no further personal service upon him was necessary, and that, on the evidence before him, the trial judge was warranted in finding that the defendant had sufficient notice of the petition in the Michigan court.

A number of copies of papers filed in divorce proceedings between certain parties

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in a court of Michigan, bound together and bearing a certificate of the clerk of the court in which the proceeding was that "the writings annexed are true copies of originals on file and of record in [his] office, and that said originals, together, constitute the record of the proceedings of said court in this cause," is a proper record under R. L. c. 175, §71, to prove the record of the Michigan court in an action at law in this Commonwealth upon a decree therein for alimony and money expended for the support of a minor child, although by a copy of the "calendar entries" in such proceedings, which was one of the papers included in those thus bound together, it appears that there were not included among the papers offered copies of some papers on file with the clerk of the Michigan court.

An action upon a decree of a Michigan court, in which were involved questions as to the law of Michigan, was tried before a judge without a jury, and an expert from Michigan testified and was cross-examined. About a month after the case had been argued fully by counsel and after the expert had returned to Michigan, the judge sent for both parties and told them what his opinion then was on the matters in issue, stating among other things that he was not satisfied that proper service had been made upon the defendant, and that, if he could be satisfied on that matter, he should find for the plaintiff. On application by the plaintiff and subject to an exception by the defendant, the case thereupon was reopened, a deposition upon written interrogatories of another expert in Michigan was taken, and the case was reheard and judgment rendered for the plaintiff. *Held*, that the action of the judge in reopening the case was within his power and was not the subject of exception.

TWO ACTIONS OF CONTRACT, upon two decrees of the Circuit Court for the County of Wayne in the State of Michigan in Chancery, dated respectively April 20, 1908, and February 23, 1909, for arrears of alimony and for sums spent by the plaintiff for the support and maintenance of a minor child of the parties, the decrees being entered in divorce proceedings in which a decree originally was entered on October 6, 1905. Writs dated, respectively, April 24, 1908, and March 5, 1909.

The cases were heard together by *Bond*, J., without a jury.

The plaintiff offered in evidence fifteen documents, including copies of all material petitions and decrees of the Michigan court and a copy of the calendar entries in the divorce proceedings in Michigan, the documents being bound together as one document, on the outside of which was the following certificate, which was signed by Thomas F. Farrell, clerk of the Circuit Court for the County of Wayne and State of Michigan, and which bore the seal of that court: "I, Thomas F. Farrell, clerk of said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the pro-

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ceedings of said court in this cause." The defendant objected to the admission of the document in evidence (1) because on its face it appeared that it was not a complete record; (2) because it was not an extended record; (3) because the decrees attempted to be proved were interlocutory and not final, and (4) because the record did not show proper service upon the defendant of the petitions seeking the decrees upon which the actions being tried were based. The objections of the defendant were overruled, the document was admitted in evidence and the defendant excepted.

From documentary evidence it appeared that the original decree of divorce of the Michigan court directed the defendant in these actions to pay to the plaintiff "as permanent alimony" "the sum of thirty-five dollars per month, beginning November 9, 1905, payable at the end of each month thereafter, monthly, for five years from and after October 9, 1905, the payment of such alimony to be in full of all interest in defendant's property, and all dower interest." It also provided that the plaintiff should "be awarded the custody of" the minor child of the parties "during each summer vacation from the close of the graded public school in the summer until the opening of such school in the fall, and that she" should "also have her during the Christmas and spring vacations. The remainder of each year the grandmother of said child, Annie Wells," was given the custody of the child. The defendant was ordered to provide the clothes and necessaries for such child, and board for her while she was with Annie Wells.

The petition upon which the decree in the first action was based alleged that the defendant owed the plaintiff as arrears of alimony $335, and that, owing to a change in the circumstances of the parties due to the death of Annie Wells, the plaintiff had continuous custody of the minor child and had been to an expense of $250 for her maintenance; and the first decree "ordered, adjudged and decreed" (1) that "there was due" to the plaintiff $335 "heretofore ordered to be paid to" her; (2) "that she be and is hereby allowed the sum of $250 for schooling and medical attendance upon said child of said parties to this time, which said sum shall be paid by" the defendant to the plaintiff "forthwith;" (3) "It is further ordered that execution issue from this

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court for the said sum of $335 and $250, a total of $585, in favor of" the plaintiff and against the defendant.

The decree in the second action "ordered, adjudged and decreed" (1) that the defendant owed the plaintiff $245 "heretofore ordered paid to" her "as permanent alimony"; (2) "that she be and is hereby allowed the sum of $130 for schooling and keeping said child of said parties from April 20, 1908, to this time," which sum was ordered to be paid by the defendant to the plaintiff forthwith; (3) and it was ordered further "that execution issue from this court for the said sum of $245 and $130, a total of $375, in favor of" the plaintiff and against the defendant, "this allowance being to January 9, 1909, and is in addition to the $585 found due" the plaintiff "on February 20, 1908, which order and decree is hereby ratified. It is ordered that execution issue therefor."

The "qualified expert" referred to in the opinion testified that, "under the law of Michigan" the decrees of the Michigan court of April 20, 1908, and February 23, 1909, were final decrees. He also stated that "in a case in chancery an appearance continued indefinitely. My opinion is based on practice and on *Coon* v. *Plymouth Plank Road Co.* 32 Mich. 248."

It was undisputed that the defendant was served with process in the original proceedings in the Michigan court and was represented by counsel therein up to the decree of October 6, 1905; that the counsels' appearance remained upon the docket in the case until after the decree of April 20, 1908, and that they were given notice of the petition upon which that decree was based. Evidence of the defendant, which was undisputed, tended to show that the authority of his counsel to appear or to act for him was withdrawn immediately after the decree in 1905. Notice of the petition upon which the decree of February 23, 1909, was based was served upon the defendant in Boston.

The cases were heard on November 29 and 30, 1909, and fully argued, both parties making in writing requests for findings of fact and for rulings of law. On December 21, 1909, "the presiding judge sent for counsel for both parties, and stated that he was of opinion that that portion of the decrees of the Michigan Court which referred to overdue alimony constituted a judgment to which he must give full faith and credit, but that

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as to so much of them as referred to allowances for support and maintenance of the child, he did not feel the same way. He also stated, however, that he nevertheless should find for the plaintiff if he could be satisfied that proper service or notice of the petitions upon which the decrees were based was given to the defendant, that he was not at the time satisfied that such service or notice was given. On application of the plaintiff's counsel, however, and subject to an exception by the defendant, he said that he would hear further evidence." Thereafter the deposition of the witness Golden was taken and introduced in evidence as well as a copy of the rules of the circuit courts of Michigan.

In answer to a hypothetical question in a cross-interrogatory by the defendant the witness Golden stated that, if he assumed "that shortly after the entry of the decree in October, 1905, the authority of the defendant's solicitors to represent him in any way was withdrawn and all relations between them and the defendant had ceased; that in reply to" a notice which was "sent to the defendant's so-called solicitors in April of 1908, the plaintiff's solicitors received information that the so-called defendant's solicitors were not his solicitors any longer and were not authorized to receive any notice with regard to him or with regard to said divorce proceedings," he would be "of the opinion that" such notice "would not be good service if there was not personal service of the notice upon the defendant." The information sent by the defendant's former solicitors in Michigan to the plaintiff's solicitor in reply to the notice of the pendency of the first petition was on a postal card which read as follows: "I am in receipt of petition and notice of hearing of the same for the 20th. I hardly know what to say in relation to the matter. I am trying to get into touch with Mr. Wells and wish that you would let the matter stand over for one week until I can hear from him. While I was a solicitor of record in the case, I have not been in touch with Mr. Wells for some time, so I do not feel that I have any authority or right to represent him until I can hear from him. I will thank you to let me know as to whether this is agreeable to you."

The fifth ruling asked for by the defendant and mentioned in the opinion was as follows: "5. If this court finds that the

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decree by the Michigan court is invalid as to part of the matters therein contained, the finding must be for the defendant."

The presiding judge at the request of the plaintiff made the following among other rulings: "Upon the undisputed evidence in the case, the decree of the Michigan court, a copy of which is annexed to the plaintiff's declaration, is entitled to full faith and credit under the United States Constitution, Art. IV., § 1."

The judge found for the plaintiff in both actions; and the defendant alleged exceptions.

Other facts are stated in the opinion.

E. V. Grabill, for the defendant.

E. Field, (*H. L. Brown* with him,) for the plaintiff.

SHELDON, J. 1. The fundamental question in these cases is whether an action can be maintained in this Commonwealth upon the decrees of the Circuit Court of Michigan which are declared on. If they are final decrees for the payment of ascertained sums of money constituting a debt of record, they are entitled to full faith and credit in every State and may be enforced by suit in the same way as any other judgments or decrees. And, while there has been some difference in the decisions, we regard it as now settled that *prima facie* at least a decree for the payment of a fixed sum of money found to be already due and payable to a wife for the past support of herself and her children is to be regarded as a final decree, although an order for future payments as a provision for future support, being ordinarily liable to modification at any time, is subject to the control of the court which made the order, and so is not a final order for the payment of a fixed sum. That was the conclusion reached by this court in a carefully considered opinion. *Page* v. *Page*, 189 Mass. 85. It is supported by other decisions. *Purdon* v. *Blinn*, 192 Mass. 387, and cases cited. *Knapp* v. *Knapp*, 134 Mass. 353. *McIlroy* v. *McIlroy*, 208 Mass. 458. *Mayer* v. *Mayer*, 154 Mich. 386. *Trowbridge* v. *Spinning*, 23 Wash. 48. *Lynde* v. *Lynde*, 181 U. S. 183, and 162 N. Y. 405.

The defendant contends, however, that under the law of Michigan these decrees were not final, because under the statutes of that State they might at any time, upon the petition of either party, be revised and altered. 3 Mich. Comp. Laws

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(1897), §§ 8630–8641. Upon this question at the trial each party put in evidence, besides these statutes, certain decisions of the Supreme Court of Michigan and there was testimony of a qualified expert. Among these decisions were the following: In *Nixon* v. *Wright*, 146 Mich. 231, it was held that an order for alimony in a decree for divorce, being subject to modification at any time by the court which made it (§ 8641, *ubi supra*), and that court having full power to enforce it, is not such a judgment for money that an action at law can be maintained upon it. The point decided went no further than our decision in *Allen* v. *Allen*, 100 Mass. 373, and does not settle the question before us. But the language of the opinion tends to sustain the defendant's contention. In *Jordan* v. *Westerman*, 62 Mich. 170, there is a *dictum* that a decree for alimony vests in a wife no absolute right thereto. In *Perkins* v. *Perkins*, 10 Mich. 425, there is a similar *dictum*, and it was held that an order of the Circuit Court, opening an order for alimony and ordering a reference to a commissioner to hear evidence and make report to the court, was not a final decree from which an appeal could be taken to the Supreme Court. But it seems to be implied in the opinion that an order for past alimony made upon the coming in of the report would be such a final decree. In *Mayer* v. *Mayer*, 154 Mich. 386, an action was sustained for arrears of payments ordered by an Oklahoma court to be made to a wife in a divorce case for her own support, but she was not allowed to recover arrears of payments, which the defendant had been ordered to make to her for the support of their children on the ground that these were subject to revision at any time by the Oklahoma court. This refusal was on the same reasoning as our decision in *Page* v. *Page*, 189 Mass. 85, and scarcely helps the defendant. But in *Martin* v. *Thison*, 153 Mich. 516, it was held that an award of alimony to a divorced wife is a valid claim against the estate of her deceased husband. This agrees with our decision in *Knapp* v. *Knapp*, 184 Mass. 353. And in *Ulman* v. *Ulman*, 148 Mich. 353, a bill was maintained to collect out of land in one county a fixed amount which had been decreed for alimony in a suit for divorce in another county. It was decided also that the order for alimony was none the less a final decree because it might be modified by the court which had

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entered it. The court said: "Authorities are abundant which hold that such a decree, for a fixed sum, is a judgment of record, and will be received by other courts as such. And such a decree rendered in any State of the United States will be carried into judgment in any other State. *Lynde* v. *Lynde*, 162 N. Y. 405; affirmed, 181 U. S. 183. *Barber* v. *Barber*, 21 How. 582. . . . It is urged that the statute (§ 8641, 3 Comp. Laws) gives to the court which renders the decree creating the lien power to modify its decree, and thereby destroys its character as a final decree enforceable in any other forum. We do not agree with this contention," citing *Trowbridge* v. *Spinning*, 23 Wash. 48, to the same effect.

Upon this evidence, with the oral testimony of Baldwin and the other evidence stated in the exceptions, the judge had a right to find, and it now must be taken that he finally did find, that these decrees were final adjudications which might have been appealed from. As this was a question of fact and there was evidence which warranted the finding, we cannot revise it.

2. The defendant contends that these decrees were entered without any proper or sufficient notice to him, and so that they are not binding upon him. In our opinion, these petitions were not new or independent proceedings, but were merely incidental to the original suit, of which he had had due notice and in which he had entered an appearance. The court doubtless would take care that proper steps were taken to give him knowledge of these proceedings, but it was not necessary that personal service should be made upon him as if new actions had been instituted, unless the laws of Michigan so required. The petitions asked only for further proceedings in the original action, proceedings which were authorized and contemplated by the terms of the statute under which the original action had been brought. The general rule is that in such a case no new personal service is needed. *Nations* v. *Johnson*, 24 How. 195. *Fitzsimmons* v. *Johnson*, 90 Tenn. 416, cited with approval in *Pennoyer* v. *Neff*, 95 U. S. 714, 734. *Laing* v. *Rigney*, 160 U. S. 531. 2 Freem. Judgments, (4th ed.) § 569. 2 Black, Judgments, § 912. In *Lynde* v. *Lynde*, 162 N. Y. 405, and 181 U. S. 183, the decree for past alimony which was sustained was entered upon the same kind of notice to the defendant that was given to this defendant

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upon the petition on which the second decree here was entered. Upon the Michigan statutes and decisions and rules of court and the oral evidence before him the judge was well warranted in finding that this general rule was recognized in Michigan and governed the proceedings that had been taken. It followed that the defendant had sufficient notice of both the petitions upon which the decrees sued on were made.

3. The record offered in evidence was rightly admitted. It was not denied that it was duly attested and authenticated. It came fully within the rules of *Brainard* v. *Fowler*, 119 Mass. 262, and *Knapp* v. *Abell*, 10 Allen, 485. The objection is that the copies contained in the record did not include certain papers which appeared by the "calendar entries" to have been filed in the case. But the certificate was that "the writings annexed are true copies of originals on file and of record . . . and that said originals together constitute the record of the proceedings" of the court. We cannot say against this certificate that the missing papers were part of the record. Every paper put on the files is not necessarily a part of the record. As to what was apparently a clerical error in the second decree sued in, by misreciting the date of the decree declared on in the first case, that does not seem to us important or material.

4. Under these circumstances the ruling that upon the uncontroverted evidence the decrees of the Michigan court were entitled to full faith and credit was not erroneous. Nor do we find any material error in the rulings or refusals to rule which were excepted to. We need not consider whether the defendant's fifth request was correct as an abstract proposition. The refusal to make specific findings of fact was not the subject of exception. *Jaquith* v. *Morrill*, 204 Mass. 181.

5. It was for the judge to decide whether he would reopen the case to allow further evidence to be taken. His conclusion is not the subject of exception. *Watts* v. *Stevenson*, 165 Mass. 518. There was no error of law, after the reopening, in admitting Golden's deposition, and the interrogatories therein specifically objected to were not objectionable.

In each case the exceptions must be overruled.

So ordered.

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JOSEPH F. RYAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 10, 1911. — June 19, 1911.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Street railway, Due care of plaintiff. *Evidence*, Of supposed knowledge to explain character of act.

In an action for personal injuries against a corporation operating a street railway, it appeared that the plaintiff was employed by the defendant as a conductor, that before starting on his first trip on the morning of the accident he had occasion to see one of his superiors in the service at a car barn of the defendant, that, although he saw a car not very far away approaching at a speed of about two miles an hour on a track that he had to cross, he proceeded to walk along a well-worn path used by the defendant's employees which led across the track on which the car was approaching and, stepping on the track without looking, was run down by the car and injured. Between the plaintiff and the point at which he saw the car approaching was what was called a "dead stop," at which all passenger cars were stopped whether there were passengers to get on or off there or not. The plaintiff testified that, when he was receiving instructions as to his duties as a conductor, he was told by his instructor that all cars stopped at this place called the "dead stop," and that in this respect the plaintiff knew no difference between the different kinds of cars. It appeared that the car which struck him was not a passenger car but a money car, which was used for collecting receipts or other similar purposes. The plaintiff testified that when he saw the car he did not know what kind of a car it was, although he had an idea that it was not a passenger car. It appeared that if this car had stopped at the "dead stop" and had started again it would not have reached the place where the plaintiff crossed until a considerable time after he had passed by. *Held*, that it was a question of fact for the jury, whether the plaintiff exercised such care as persons of ordinary prudence would be expected to exercise, in relying upon his supposed knowledge that all cars approaching from the place where he saw the car that afterwards struck him would stop before reaching the place where he crossed.

In an action for personal injuries from being run down by a street car of the defendant, the plaintiff may be asked by his counsel why he did not look before stepping on the track in front of the car that injured him, his presumed answer being a statement of his supposed knowledge that in accordance with a rule of the street railway company this car like all other cars would stop at a "dead stop" before reaching the place where he was crossing.

TORT for personal injuries received by the plaintiff, a conductor on the street railway of the defendant, from being run down by a car of the defendant while he was walking along a path, worn by the employees of the defendant, on his way to the defendant's car barn at its Reservoir station in Boston near the boundary of Brookline. Writ dated August 6, 1907.

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In the Superior Court the case was tried before *Brown*, J. The material facts shown by the evidence are stated in the opinion. The defendant contended that there was no evidence of due care on the part of the plaintiff, and asked the judge to order a verdict for the defendant. The judge said, "It seems to me if this plaintiff had given the slightest glance as he came around the rear of that car, the accident would not have happened. He didn't give it because he assumed this was like passenger cars and would stop. I don't think that is an excuse. I think he should have looked."

The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions. The exception to the exclusion by the judge of a question to the plaintiff is described sufficiently in the opinion.

C. W. Bond, (*W. W. Friend* with him,) for the plaintiff.

R. A. Stewart, for the defendant.

KNOWLTON, C. J. The plaintiff was employed by the defendant as a conductor on its electric railway. Early in the morning of June 25, 1907, before the time for starting on his first trip, he had occasion to see one of his superior officers at the defendant's car barn near the Chestnut Hill reservoir. For that purpose, he was riding on an electric car on the outbound track toward Chestnut Hill and, as it approached the terminus of the railway near the car barn, he stepped off the car while it was moving slowly, and started, by a well-worn path, which was used by the defendant's employees, across the inbound track, towards the car barn. While crossing this track he was struck by another of the defendant's cars and injured.

There was evidence proper for the consideration of the jury tending to show negligence on the part of the defendant's servants in charge of this car.

The only difficult question in the case, is whether there was evidence that the plaintiff was in the exercise of due care. It is not suggested that there was any lack of care in stepping from the car on which he was riding before it came to a stop. He saw the car that struck him as it was approaching at a speed of about two miles an hour not very far away, and the contention is that he was negligent in not continuing to observe it or in not looking for it a second time before it struck him. On this part

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of the case the evidence was uncontradicted, that between him and the place where he saw the car approaching, there was what is called a "dead stop." It was also an undisputed fact that all passenger cars were accustomed to stop at this place, whether there were passengers to get on or off there or not. The plaintiff testified that when he was receiving instructions as to his duties as conductor, he was told by his instructor that all cars stopped at this place called a "dead stop." He testified that, in this respect, he knew no difference between different kinds of cars. It appeared that the car that struck him was not a passenger car but was used for collecting receipts or other similar purposes. The plaintiff testified that when he saw it he did not know what kind of a car it was, although he had an idea that it was not a passenger car. If this car had stopped at the "dead stop" and started again it would not have reached the place where the plaintiff crossed until a considerable time after he had passed by. There was evidence that from eighty to one hundred conductors and motormen were employed on this part of the railway and, from this and other testimony in the case, the jury might have inferred that even if the plaintiff had known that money cars did not stop at this point the chances were not one in one hundred that an approaching car was one of this kind. The jury might have found from the evidence that the plaintiff thought it certain when he saw the car approaching, that it would stop before reaching the place where he crossed, and that there was no danger in crossing.

We are of opinion that it was a question of fact for the jury whether the plaintiff exercised such care as persons of ordinary prudence would be expected to exercise, in relying upon his supposed knowledge that all cars approaching from the place where he saw the car that afterwards struck him would stop before reaching the place where he crossed.

The question put to the plaintiff as to why he did not look before stepping upon the track was competent and the proposed testimony should have been admitted. *McCrohan* v. *Davison*, 187 Mass. 466. *Whitman* v. *Boston Elevated Railway*, 181 Mass. 138. Presumably he would have answered stating his supposed knowledge that this car like all other cars would stop before reaching the place where he was about to cross. But the jury might in-

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fer this without an express statement from him. A majority of the court are of the opinion that the exceptions should be sustained.

So ordered.

JAMES E. ROBINSON & another *vs.* AGNES F. RICHARDS (afterwards by amendment successively WINIFRED R. MURPHY and JOSEPH P. MURPHY).

Suffolk. March 17, 1911. — June 19, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Fraud. False and Fraudulent Representations.

A person, who by information given to the assessors of a city procured certain land to be taxed as belonging to persons unknown, and who afterwards, when the land had been sold for non-payment of taxes, procured a deed of the land to himself from the owner, thus described as unknown, who was a woman, by falsely representing to her that in asking her to release to him her interest in the land he was acting solely for a yacht club that owned the adjoining land, whereas he was acting for himself, and by making statements to her, which were intentionally misleading if not actually false, to the effect that, by reason of the tax sale and the expiration of the time for redemption and also by reason of a certain mortgage, she had no title to the land, and who, having procured this deed, redeemed the land from the tax sale made under R. L. c. 13, § 58, cl. 1, as being land "taxed as belonging to persons unknown," also procuring from the mortgagee a release and discharge of the mortgage on the land, has no title that upon a petition to the Land Court can be registered against the objection of the owner of the land from whom he procured his deed, because such owner has a right to avoid the deed as procured from her by false representations.

MORTON, J. This is a petition brought in the Land Court to register the title to a parcel of land in Dorchester formerly belonging to one Agnes F. Richards who died during the pendency of the proceedings and whose daughter, her only heir at law, was thereupon made the party respondent in her place. The daughter also died and was succeeded by her husband as her statutory heir, and he is now the party defending. We shall speak of Mrs. Richards as the respondent. The answer set up title in the respondent and also alleged that a deed from her to the petitioner Robinson, which was relied on, had been procured from her by fraud and deceit on the part of Stark, the other petitioner, and asked to have it declared null and void. The

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Land Court found in favor of the petitioner. The respondent appealed to the Superior Court. Issues, in the form of questions, were framed in the Land Court and were submitted to a jury in the Superior Court. The jury answered the questions in favor of the respondent. Thereupon the issues, with the answers thereto, were returned into the Land Court, and upon a further hearing that court * ruled that upon the uncontroverted facts found by it at the previous hearing and upon the facts found by the jury the respondent was entitled to have the deed avoided on the ground that it was procured by false representations, and ordered that the petition be dismissed. The petitioners excepted to the ruling, and the exception thus taken presents the only question that is before us in relation to the case. We think that the ruling was right.

There was no dispute that the title was originally in Mrs. Richards. In 1875 she had executed a mortgage on it to one Wall for $1,000, and in 1882 he assigned the mortgage to one Perry. Mrs. Richards never made any use of the land, and never paid any taxes on it and never paid anything on the mortgage, principal or interest. The mortgage never was foreclosed, and so far as appears no steps ever were taken to collect either principal or interest. From 1886 to 1895 inclusive the land was assessed to "Owners unknown, Agnes F. Richards probable owner, Francis A. Perry probable mortgagee." In October, 1895, it was sold for non-payment of taxes to one Frothingham who shortly after assigned his tax title to one Wyzanski, who took possession of the land under his tax deed, let it and paid the taxes on it till 1906, when Stark, acting for the petitioner Robinson, claimed the right to redeem by virtue of the title acquired by Robinson from Mrs. Richards. Wyzanski at first objected, but finally admitted Robinson's right to redeem under R. L. c. 13, § 58, cl. 1, and Robinson thereupon redeemed. Stark then went to Perry, the mortgagee, and by various representations tending to show that it was of no value, procured from him a release and discharge of the mortgage. Thereupon Robinson and Stark divided the land between them. So far as appears Mrs. Richards did not know that the land had been taxed until in-

* By *Davis*, J.

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formed of the tax sale by Stark in 1906. It was not taxed until 1885, and then it was taxed because Stark called the attention of the assessors to it and procured it to be assessed with the intention of acquiring title to it by means of a sale of it for non-payment of taxes. Shortly before Stark procured the deed in question from Mrs. Richards to Robinson the Savin Hill Yacht Club had acquired land adjoining that of Mrs. Richards, and the result of the answers of the jury and of the facts found by the Land Court at the previous hearing was to show that Stark falsely represented to her that he was interested in the matter solely for that Club and was acting for it in asking her to release her interest in the land, and that she relied upon such representations in making the deed, whereas in truth and in fact he was acting for himself and the petitioner Robinson. This of itself constituted such a fraud upon her as to entitle her to avoid the deed. *Thompson* v. *Barry*, 184 Mass. 429. *Stewart* v. *Joyce*, 201 Mass. 301. In addition to this it would seem that he made statements to her intentionally misleading, if not actually false, to the effect that she had no title to the land by reason of the tax sale and the expiration of the time for redemption, and also by reason of the Perry mortgage, and in regard to the extent to which Robinson's title to land adjoining her land on the side opposite to that belonging to the Yacht Club conflicted with her title. Taking the case as a whole it is plain, we think, that the ruling was right and that the petition was properly dismissed.

Exceptions overruled.

C. W. Cushing, for the petitioners, submitted a brief.

E. J. Fegan, for the respondent.

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CORNELL-ANDREWS SMELTING COMPANY *vs.* BOSTON AND PROVIDENCE RAILROAD CORPORATION.

Bristol. October 24, 1910. — February 27, 1911.*

Present: HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Damages, For property taken or injured under statutory authority. *Grade Crossing. Eminent Domain. Landlord and Tenant*, Option to renew lease. *Contract*, What constitutes. *Practice, Civil*, Petition for damages caused by abolition of grade crossing. *Fixtures. Evidence*, Relevancy and materiality.

Review by LORING, J., of the decisions of this court and of the statutes relating to the awarding of damages for the taking of land or interests therein by an act of eminent domain, where at the time of such act several persons have several estates or interests in the property taken or damaged.

The decision in *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 202 Mass. 585, that, in assessing damages suffered by a lessee of real estate by the abolition of a grade crossing of a railroad with a way, a provision in the lease giving to the lessee a right at any time during its term of ten years to purchase the premises leased at their fair value should not be taken into consideration either to enhance or to diminish the lessee's claim, affirmed.

An option, giving to the lessee of real estate a right at his election to buy the fee at any time during the term of the lease, although it adds to the value of the lessee's rights under the lease, is no part of the lessee's estate in the land, but is merely a contract right.

Where, under a provision of a certain lease of land, the lessee is given an option at any time during the term of the lease to buy from the lessor the fee in the land, and during the term the land is taken by an act of eminent domain by a railroad corporation in the abolition of a grade crossing, although at the trial of a petition by the lessee for the assessment of his damages the provision in the lease regarding the option cannot be considered, nevertheless *it seems* that he is not remediless, because, while he no longer at his election can buy the land, he can at his election buy the fund into which in equity the land has been converted by the exercise of the power of eminent domain.

Where the owner of a large tract of land leases a portion of it to one who, upon the portion so leased being damaged by an act of eminent domain by a railroad company in the abolition of a grade crossing, files a petition for the assessment of his damages, and under the provisions of R. L. c. 48, § 21; c. 111, § 153, the lessor is ordered to intervene, the lessor should not include in his intervening petition damage to any other land than that described in the petition of the lessee.

If the owner of a tract of land, a part of which is subject to a lease, upon the land being damaged by acts of eminent domain by a railroad corporation in the aboli-

* The opinion in this case was withdrawn on an application for a rehearing. The application was granted and new briefs were submitted. The decision was not changed, and on June 20, 1911, the opinion was returned to the Reporter.

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tion of a grade crossing, files a petition for the assessment of his damages as to his entire tract including that subject to the lease, and the lessee also files a petition for the assessment of his damages, and the court under the provisions of R. L. c. 48, § 21; c. 111, § 153, orders the lessor in the proceedings instituted by the lessee to file an intervening petition for the assessment of the damages he had suffered with regard to the land subject to the lease, the making of such an order brings to an end the lessor's right to proceed under the petition he already had filed so far as his interest in the land subject to the lease is concerned.

Where the owner of certain land and one to whom he has leased a portion of it, upon the land's being damaged by acts of eminent domain of a railroad corporation in the abolition of a grade crossing of the railroad with a private way, severally file petitions against the railroad corporation for the assessment of their damages and, the petitions being tried together and verdicts rendered for the petitioners, a motion of the respondent to set aside the verdict rendered for the lessor is filed but not acted upon, and exceptions by the respondent in the action of the lessee against it are sustained and a new trial ordered, there should be no new trial of the petition of the lessee until it is determined whether there is to be a new trial of the petition of the lessor, because the jury should be in a position to ascertain first and set forth in their verdict the entire damage to the property as if it were owned by one person in fee, and then to apportion such entire damage between the lessor and the lessee.

Statement, by LORING, J., of the proper procedure where leased land, on which buildings containing fixed machinery have been erected by the lessee, has been taken or damaged by the exercise of the power of eminent domain and petitions have been brought by the lessor and the lessee to have their damages assessed.

Upon a review of the record of a former trial, with petitions by the lessor, of this petition by a lessee of real estate to recover damages due to the abolition of a grade crossing of the defendant railroad corporation with a private way and the consequent extinguishment of another private way which had furnished the only means of access to a factory containing fixed machinery, erected upon the leased land by the petitioner, and of the opinion of this court, reported in *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 202 Mass. 585, stating their decision sustaining exceptions taken by the respondent at that trial, it was *held*, that the lessor's share of the damage done to the buildings and fixed machinery must be taken to have been included in verdicts rendered on the lessor's petitions, which had not been set aside, and that the lessee did not have any right to proceed at a subsequent trial of his petition on the basis that such damages belonged wholly to him and were to be recovered under his petition.

In a petition by a manufacturing corporation, which carried on its operations in buildings which it had erected and occupied with fixed machinery upon land which it held under lease, for damages suffered by it from acts of eminent domain of a railroad corporation in the abolition of a grade crossing, the lessor was ordered to file an intervening petition for such damages as he had suffered, and this court *held*, that, upon the filing of such an intervening petition and the trial together of the petition and the intervening petition, the jury must determine first and set forth in their verdict the entire damage done to the real estate leased, including as part thereof the buildings and the fixed machinery put in them by the lessee, that the amount of such entire damage then must be apportioned between the lessor and the lessee, and, if the lessee had suffered any special damage during the acts of abolition of the crossing, or if his damage in the matter of access to his manufactory was different from that of the lessor,

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that the amounts of such damage should be found and set forth in the verdict specially in addition to the sums previously mentioned; and that, as to the lessor's entire share of the damage to the real estate, there should be a separation of so much thereof as represents his share of the damage done to the buildings and fixed machinery from what represents his share of the damage done to the land, in order that the lessee may exercise his right of removing trade fixtures, which right, after the acts of eminent domain, covers the buildings and fixed machinery and the damage done to them, including the lessor's share of that damage.

At the trial of a petition against a railroad corporation for the assessment of damages caused to the petitioner by acts of eminent domain of the respondent in the abolition of a grade crossing of the railroad with a private way, which acts resulted in the extinguishment of another private way, which formerly had been the only means of access to the petitioner's land upon which he had a manufacturing establishment, and in the erecting of a high embankment along the side of the manufactory, the trial judge admitted evidence offered by the respondent and tending to show that at a comparatively small expense a way from the petitioner's land could have been constructed connecting the land with a new street, which had been constructed as part of the acts in abolition of the crossing, and that the value of the land covered by such new way would have been small. In his charge the judge instructed the jury that, although he could not say that the petitioner was bound or was not bound to attempt to procure such a way, yet if the jury were satisfied that the possibility of his doing so would have affected the market value of the land after the extinguishment of the private way, they could take that into account. *Held*, that, as guarded by the instructions to the jury, the evidence properly was admitted.

LORING, J. At the trial consequent upon the decision of this court in *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 202 Mass. 585, the respondent asked for a ruling in the words used by us in describing the rules of law by which the new trial then ordered was to be governed. This the presiding judge * refused to give without modification, and the respondent took an exception. The questions of law involved in this ruling were not discussed in the former opinion. In view of that and of the earnest argument made by the learned counsel for the petitioner we have considered the matter anew.

The second trial was had on the lessee's petition against the railroad. The ruling requested by the respondent was in these words: "The value of the lessee's option of purchase, provided for in the lease, can neither enhance nor diminish the petitioner's claim, as damages are assessed for injury to its interest as of the date of the taking." This was the eighth ruling asked for by

* *Stevens*, J.

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the respondent. Coupled with it was the respondent's fourteenth request for a ruling in these words. "The jury are not to assess total damages to the land leased and the buildings and fixed machinery therein to this petition, but are limited to damages for the remainder of the term, which is approximately six years. The jury are to consider that all damages to the leasehold property beyond the six-year term, if any, have been or will be recovered by the lessor." The judge refused the fourteenth and gave the eighth, "with the addition 'except so far as it may add to the value of the leasehold interest.'" He told the jury that they were first to determine "the fair market value of the leasehold interest which this petitioner had in that property, including, of course, the improvements made upon it, including any additional value that may have been given to it, if there was an additional value on account of the option, on account of the privilege of buying it at the end of ten years if it saw fit to do so," and then to decide how much that value of the leasehold interest had been impaired by the order for splitting grades which cut off access to Maple Street and put the factory under the new embankment which was twenty-seven feet high at the easterly end of the petitioner's premises and twenty-one feet at the westerly end of them.

Our former decision went on the footing that the damage done to the lessor's reversionary interest (1) in the land leased to the petitioner and (2) in the buildings and machinery put on the land by the lessee at its expense, had been finally disposed of by the separate verdicts which the lessor had recovered, or at any rate by those verdicts coupled with a statement of the petitioner's counsel made in argument before this court and acceded to by the respondent's counsel. We shall have to deal later on with this statement and concession. In other words the former opinion went on the footing that, although originally the damage done in the case at bar had been done to land owned in part by a lessor and in part by a lessee (whereby a case within R. L. c. 48, §§ 20–23, was presented), yet when this case was sent back for a new trial by the decision in 202 Mass. 585, the amount due to the lessee was the only matter left to be determined, as was the case in *Pegler* v. *Hyde Park*, 176 Mass. 101. But although it was then assumed that the only matter left to be

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determined was the amount due to the lessee, the question whether the judge was or was not right in telling the jury in the case at bar that they could consider the option of purchase given in the lease to the lessee in determining the value of its leasehold interest depends upon the principles upon which compensation is to be made when land taken or damaged by the exercise of the power of eminent domain is owned by a lessor and lessee.

There is no better way of arriving at a full understanding of that question than by starting at the beginning and following down the course of our decisions and of the statutes enacted by the Legislature. There is the more reason for doing that here because in the case at bar the proceedings have not been kept in the channel prescribed by these enactments of the Legislature.

It was held in *Ellis* v. *Welch*, 6 Mass. 246, that "any person having an interest in the land [taken for a public way], either as lessee for years, tenant for life, or for any greater estate of freehold, as also he in reversion or remainder, is an owner within" St. 1786, c. 67, § 1, giving to the owner of land taken for a highway compensation for damage thereby done. To have the damage done to the tenant in such a case determined by one jury and that done to the reversioner determined by another manifestly led or was likely to lead to results which varied when they should have been the same, even in the simplest of cases, for example, in case of a farm in the country. But there are cases where the miscarriage of justice likely to result is still greater if the damage done to the tenant or tenants and that done to the landlord are determined in separate actions. Take the case put by the Commissioners of the Revised Statutes, where there are "a number of tenants for different terms of years, on conditions creating very different rights and liabilities and exposing them to different degrees of injury." Commissioners' Report, 153. Or take as an example the case presented in *Patterson* v. *Boston*, 23 Pick. 425, where the front wall of a building fronting on Hanover Street in the city of Boston and let out in parts to several tenants was taken down in widening that street and never replaced.

To remedy these evils the Commissioners of the Revised Statutes suggested that "whenever there shall be several parties

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having several estates or interests at the same time in any land or any buildings standing thereon" taken for a public way, any one of such parties may on application cause "all the other parties" interested to "become parties to the proceedings." And in such a case the jury "shall first find, and shall set forth in their verdict, the total amount of the damages sustained by the owners of such land and buildings, estimating the same as an entire estate and as if the same were the sole property of one owner in fee simple; and they shall then apportion the said total amount of damages among the several parties whom they shall find to be entitled, in proportion to their several interests and to the damages sustained by them respectively; and they shall set forth such apportionment in their verdict." The commissioners further recommended that if any person having an interest in land or buildings as aforesaid who had been summoned in should neglect to appear and become a party to the proceeding, he should be forever barred from making any application for damages. Commissioners' Report, c. 24, §§ 42–47. And see note to the same at p. 153. This recommendation was adopted by the Legislature, became Rev. Sts. c. 24, §§ 48–53, and since then, with some amendments, has been the law of the Commonwealth. Gen. Sts. c. 43, §§ 53–58. Pub. Sts. c. 49, §§ 20–25. R. L. c. 48, §§ 20-24.

The commissioners' statement of the reasons for this suggestion was in these words: "The provisions of these six sections, which are in the nature of a bill in equity, are intended to afford a more convenient means of doing justice to all parties in such cases."

By St. 1851, c. 290, it was provided that "Whenever any person shall have a claim for damages . . . having different or separate interests in the said property, so that an estate for life or for a term of years in the same belongs to one person, and the remainder or reversion in fee belongs to another," an entire sum shall be assessed without apportionment, and shall be paid over to a trustee upon trust to pay the income of the trust fund to the tenant for life or for years and on the termination of that estate to pay the principal to those entitled to the reversion. This (with an amendment made by St. 1883, c. 253) is now R. L. c. 48, §§ 17–19. For cases within these sections see *Bos-*

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ton v. *Robbins*, 121 Mass. 453; *Turner* v. *Robbins*, 133 Mass. 207. See also *Edmands* v. *Boston*, 108 Mass. 535, 547. All other cases are within the provision originally adopted in Rev. Sts. c. 24, §§ 48–53, pursuant to the recommendation of the Commissioners (now R. L. c. 48, §§ 20–24.) See *Edmands* v. *Boston*, 108 Mass. 535; *Willard* v. *Boston*, 149 Mass. 176; *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 187 Mass. 45; *Galeano* v. *Boston*, 195 Mass. 64; *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 202 Mass. 585.

The purpose of these statutes regulating the method of procedure where a lot of land taken for a highway is owned by more than one person is twofold: First, to have the interdependent rights of all settled at the same time; and secondly, to establish the principle that the amount of damages to be paid where the same land is owned by several persons shall be determined as if it had been owned by one person in fee. This was stated in terms in the original act (Rev. Sts. c. 24, § 50), and is stated in terms in the present act (R. L. c. 48, § 22). It is this feature of the act which has been most often insisted upon by the court. In *Edmands* v. *Boston*, 108 Mass. 535, 544, Wells, J., said: "The situation of the estate and the manner of its occupation are doubtless to be taken into consideration in estimating the injury caused by disturbing that occupation. But between the public and the landowner it is but one estate. The public right is exercised upon the land itself, without regard to subdivisions of interest by which the subject is affected through the various contracts of individual owners. The public cannot be expected to forego its right to take property for public uses because the exercise of that right will defeat private contracts; nor is it reasonable that losses arising from the failure of such contracts, which otherwise might furnish grounds of damage between the individual parties, should measure the compensation to be rendered for the property so taken. Such a rule would seriously impair the public right. A fair compensation for the property taken and injury done, ascertained by general rules, is a substitute to the owners for that of which they are deprived. That is the whole of the transaction with which the public is concerned. The apportionment is merely a setting out to the several owners of partial interests of their corresponding

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rights in the fund which has been substituted for the property taken." In *Burt* v. *Merchants' Ins. Co.* 115 Mass. 1, 15, Gray, C. J., said: "But no contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole." To the same effect see Knowlton, C. J., in *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 187 Mass. 45, 50.

The parties who have a right to bring a petition for damages or to intervene in one brought by another are those who have an estate in the lot of land taken or damaged. There is no case in which any one but the owner of an estate in the land in question has been allowed to bring a petition for land damages or to intervene in one brought by another, and it was on this ground that the case of *Emery* v. *Boston Terminal Co.* 178 Mass. 172, was decided.

It was said in *Boston* v. *Robbins*, 121 Mass. 453, 455, that: "It was afterwards decided that these sections, in terms as well as in intent and spirit, were applicable to a tenancy in common, or to an estate in which one person had the legal title and another an equitable interest under a bond for a deed. *Dwight* v. *County Commissioners*, 7 Cush. 533. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385." The second of these two cases (*Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*) is the case referred to above as the case in which it was decided that these sections were applicable to an estate in which one person held the legal title and another an equitable interest under a bond for a deed. In that case the Proprietors of Locks and Canals had given a bond to one Howard on May 14, 1844; the land was taken in August, 1846; Howard completed his payments on May 16, 1847, and received a deed at that time; and the petition was brought on July 11, 1850. Under these circumstances the Proprietors of Locks and Canals and Howard joined in bringing the petition for the sole benefit of Howard. What was decided and all that was decided was "that the respondents, as they cannot be injured by a single assessment, can take no exception." p. 387. This was pointed out by Colt, J., in *Drury* v. *Midland Railroad*, 127 Mass. 571, 578. More than that, the petition in *Proprietors of Locks & Canals*

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v. *Nashua & Lowell Railroad* was brought to recover the injury done to the fee which was owned by the corporation when the land was taken, but which had passed to Howard under a prior contract before the petition was brought. The two were joined because this one fund had passed under a prior contract to Howard, not because it became necessary to apportion the amount due between the Proprietors of Locks and Canals and Howard. For that reason it was not a case under Rev. Sts. c. 24, § 48, at all.

By St. 1874, c. 388, it was provided that in cases provided for by St. 1851, c. 290, any special and peculiar damages suffered by a tenant should be assessed separately and paid to the tenant and not to the trustee. It was held in *Galeano* v. *Boston*, 195 Mass. 64, that in cases under the other section (where the fund is not paid to a trustee but is apportioned between the several persons whose estates together make up the fee) if there are damages special and peculiar to one tenant they should be dealt with in the same way.

The petition now before us is a petition for compensation for damages done by a decree for a change in a railroad private grade crossing made under R. L. c. 111, §§ 149 *et seq.*, and the statutes amending these statutes. By the terms of § 153, the highway acts stated above apply to such petitions.

We understand that the learned counsel for the petitioner in effect concedes that ordinarily the only person who can bring a petition for compensation is the owner of an estate in the land. His argument is that the option added to the value of the lessee's leasehold interest, and if it did he has asked with great insistence why the petitioner should not have compensation for the diminution in the value of all his rights under the lease including the option.

The objection to his contention which first presents itself is that it would be impossible to apportion the damage done to the land "as if it were the sole property of one owner in fee simple" between the lessee (who has an option to buy the fee if he elects to do so but not otherwise) and the owner of the fee subject to a lease for a fixed term of years and to this right of the lessee to purchase the fee at its election and only at its election.

But the real objection to this contention is that, although the

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insertion in a lease of an option giving to the lessee at his option a right to buy the fee adds to the value of the lessee's rights under the lease, it is no part of the lessee's estate in the land. It is a contract right and nothing more, although contained in the lease and although it is a contract right which passes to an assignee of the lease. It is not an extension or amplification of the lessee's estate. Where a lease contains an agreement for an extension of the term thereby created it was assumed in *Stark* v. *Mansfield*, 178 Mass. 76, that the lessee should be treated as having an estate for the extended term. But what a lessee gets by the exercise of an option to buy the fee is not an extension of the leasehold estate but a new estate of a different kind. The lessee's rights under such an option are rights which lie in contract and do not create in the lessee any estate in the land. Being rights which lie in contract, the lessee as the holder of such an option cannot bring a petition for damage done to the land, or intervene in one brought by the owner of an estate in the land. Neither can he in a petition brought by himself as lessee (to recover the compensation due for damage done to his estate in the land) have the value of his estate in the land increased by the value of the option. As was said by Gray, C. J., in *Burt* v. *Merchants' Ins. Co.* 115 Mass. 1, 15: "But no contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole."

In such a case the holder of an option to buy is not remediless. Where land of B on which A has an option of buying the fee is taken by the exercise of the paramount power of eminent domain, A can no longer at his election buy the land but he can at his election buy the fund into which in equity the land has been converted by the exercise of the power of eminent domain. The doctrine that the compensation paid for land taken by the exercise of the power of eminent domain in equity represents the land and is subject to all the rights of persons who had rights in the land, is a familiar doctrine resting on principles of general application. See for example *Holland* v. *Cruft*, 3 Gray, 162; *Bates* v. *Boston Elevated Railway*, 187 Mass. 328, 337, and cases cited; *Hunneman* v. *Lowell Institution for Savings*, 205 Mass.

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441, 445, and cases cited. Indeed the provision of St. 1851, c. 290, (now R. L. c. 48, §§ 17, 18,) providing that when land taken is owned entirely by a lessor and lessee the fund shall be paid to a trustee and held by him on the same terms that the land was subject to, is based upon and is a statutory regulation of this principle of equitable conversion. As to this see Wells, J., in a portion of the opinion in *Edmands* v. *Boston*, 108 Mass. 535, 544, which we have already quoted.

In the case at bar, before the taking the Cornell-Andrews Company had the right at its election to buy the property covered by the lease on paying the price named therein. After the taking this right attached to the land and to the lessor's share of the damage done by the taking to the land covered by the lease. We are of opinion that the presiding judge should have given the eighth ruling asked for by the respondent without modification, and that the exception taken to his refusal to do so must be sustained.

We proceed to the consideration of several matters which will arise at the new trial.

When the first trial took place there were eight petitions before the court, consisting of four sets of two petitions each. Each set consisted of one petition against the Boston and Providence Railroad and of another against the town of Attleborough. The first set of two petitions (numbers 4497 and 4498) were petitions brought by the Cornell-Andrews Smelting Company for damage done to the land, buildings and machinery covered by the lease. The second set (numbers 4600 and 4601) were petitions brought by Watson, the lessor, and covered all his land west of the railroad (ten acres in extent), including the seventy-eight thousand feet let to the Cornell-Andrews Smelting Company. The third set (numbers 4604 and 4605) covered all Watson's land west of the railroad and south of Maple Street including the land let to the Cornell-Andrews Smelting Company. And the fourth set (numbers 4606 and 4607) covered Watson's land west of the railroad and north of Maple Street.* There were four sets of two petitions each in

* Maple Street, as stated in the former report of this case in 202 Mass. 585, 589, is the street shown on the plan there published as "roadway," "private way discontinued" and "private way."

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place of four petitions because by the terms of the statute a petition had to be brought against the town for the damage done by laying out the new highway, and against the railroad for the damage done by the abolition of the crossing of Maple Street (which was a private way) over the railroad.

In both petitions brought by the Cornell-Andrews Smelting Company, (the lessee,) on motion made by it under R. L. c. 48, § 21, Watson the lessor was ordered to intervene. Pursuant to those orders he filed copies of the petitions in numbers 4600 and 4601 covering all his land west of the railroad, ten acres in extent.

The eight petitions came on for trial together, and Watson was required to elect between numbers 4600 and 4601, each of which covered the ten acres, and 4604, 4605, 4606 and 4607, in which the ten acres were divided into two parts as stated above. Watson elected to proceed with 4600 and 4601, each of which covered the whole ten acres, and the presiding judge directed verdicts to be entered for the respondents in numbers 4604, 4605, 4606 and 4607. The jury found two verdicts for the lessee in the two petitions brought by it (numbers 4497 and 4498), the first against the town and the other against the railroad; and two verdicts for the lessor in the two petitions brought by him (numbers 4601 and 4600), the first against the town and the other against the railroad.

The lessee's verdict in 4497 was set aside by the judge and its verdict in 4498 was set aside as the result of our decision in *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 202 Mass. 585. We infer from what appears that it has not yet been decided whether the verdicts in favor of the lessor in 4600 and 4601 are or are not to stand.

We are of opinion that when Watson the lessor was summoned in by the lessee to intervene in its petition he should have filed an intervening petition covering the land described in the lease and not one covering his whole ten acres. The lessee was not interested in the eight acres not covered by the lease and that land should not be made the subject of the intervening petition of the lessor in the lessee's petition.

After the order to Watson to intervene in the lessee's petition had been made, Watson's right to proceed under his separate

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petitions (so far as his interest in the land covered by the lease was concerned) came to an end by force of R. L. c. 48, § 23, and his independent petitions for the recovery of damages to the leased land were not properly before the court. At the first trial the presiding judge stated to the jury that the lessor had intervened in both petitions brought by the lessee and he also told them, with respect to the land covered by the lease, "You are to assess the damages as a whole and then divide it" between the lessor and the lessee. But he then went on, ignoring the fact that the lessor had been required to intervene in the petitions brought by the lessee and the fact that the lessor's independent petitions (so far as the leased land was concerned) were no longer properly before the court, and took four verdicts, two in favor of the lessor on his independent petitions (which, as we have said, were not then properly before the court) and two in favor of the lessee on its petitions. Apparently the intervening petitions of the lessor were ignored and never have been disposed of.

It is manifest that the judge who presided at the first trial was wrong in taking separate verdicts fixing the damage done to the lessor and to the lessee, so far as the real estate covered by the lease (including the buildings and fixed machinery) was concerned. It is equally manifest that a mistake was made at the second trial when (ignoring the fact that the lessor had intervened in it) the lessee's petition against the railroad was tried before it had been ascertained whether the separate verdicts taken in the lessor's independent petitions were or were not to stand. No new trial should have taken place on the lessee's petition as a separate petition until the question whether the verdicts on the lessor's petitions were or were not to stand. That question has not yet been settled. If the verdicts in the lessor's petitions do not ultimately stand, the damage done to both lessor and lessee should be established by one verdict, as prescribed by R. L. c. 48, § 22, rendered in the petition or petitions brought by the lessee in which the lessor has been summoned in to intervene. Until the question has been decided whether the verdicts in the lessor's petitions are or are not to stand, no trial should be had on the lessee's petition.

The present status of these petitions has been brought into

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further confusion by a statement made by the lessee's counsel in his argument when the case was first before this court. He then made a statement which was referred to in our former opinion, 202 Mass., at page 598, as a statement that "the lessor made no claim that the buildings and fixed machinery formed a part of his estate." The statement by the lessee was acquiesced in by the counsel for the respondent railroad and was referred to by us in our former opinion as a fact which was important in fixing the status of the litigation. We shall deal with this later on.

We have not until now referred to the fact that the buildings on the leased land at the date of the decree had been erected by the lessee at its own expense, and that there was in these buildings fixed machinery which had been attached to the freehold by the lessee and that this had been done at the lessee's expense.

Before considering the effect to be given to the statement of the lessee's counsel acquiesced in by the counsel for the railroad, we stop to point out how a case should be dealt with where leased land (on which buildings containing fixed machinery have been erected by the lessee) has been taken or damaged by the exercise of the power of eminent domain.

Such buildings at the time of the taking are part of the freehold and as such are the property of the lessor subject to the leasehold interest of the lessee for the unexpired term of the lease. In estimating the damage done in such a case an entire sum is to be found (and set forth in the verdict) as if the property were owned by one person in fee, and this entire sum represents the whole damage done to the realty including the buildings and fixed machinery. *Allen* v. *Boston*, 137 Mass. 319. *Williams* v. *Commonwealth*, 168 Mass. 364. But where the buildings and the fixed machinery are put in by the lessee at its own expense, they are trade fixtures which the lessee has a right to remove during the continuance of the lease. See *Smith* v. *Whitney*, 147 Mass. 479; *Antoni* v. *Belknap*, 102 Mass. 193; *Watriss* v. *National Bank of Cambridge*, 124 Mass. 571, 575. In such a case, before the taking the lessee had a right to remove the buildings and fixed machinery. After the taking, that right is transferred to the buildings and fixed machinery plus the damages done to them by the taking.

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The obvious meaning of the statement of the lessee's counsel, as set forth in 202 Mass., at page 598, standing alone and carried to its logical conclusion, was that the damage done to the buildings and fixed machinery did not enter into the verdicts which the lessor had recovered, and that so far as any damage was done to the buildings and fixed machinery the lessee and the lessee alone always had had and still had the right to recover the whole of that damage.

But the respondent's counsel never have acceded to that as the true interpretation of what then took place. It seems that this statement was made by the lessee's counsel in answer to a question put by the Chief Justice to find out whether, having reference to the lessor's claim for damages, the lessee's separate petition could then be heard. Counsel for the respondent may well have understood that the statement in which he acquiesced, made in answer to that question, did not go to the length to which it goes standing by itself and as set forth in 202 Mass. 598. Counsel for the respondent has contended at great length in his brief in this case that under the charge of the presiding judge at the first trial the damage done to the lessor's reversionary interest in the buildings and fixed machinery was included in the verdicts rendered on the lessor's petitions, and that he never has agreed to any other view of the case. The lessor's petitions for damages set forth that the buildings here in question had been erected on his land, and asked for damages sustained by him as set forth in the petition; and in our opinion, under the charge of the judge at the first trial the lessor's share of damage done to the buildings and fixed machinery must be taken to have been included in the verdicts rendered on the lessor's petitions. If the lessor's proportion of the damage done to the buildings and fixed machinery was included in the verdicts rendered on the lessor's petitions, the effect of the acquiescence of the respondent's counsel in this statement would have been to make the respondent pay twice for the reversioner's share of the damage done to the buildings and fixed machinery. Further, there are two statements in the opinion in 202 Mass., one at p. 598 and the other at p. 599, which show that this court did not then give to this statement the meaning which it is now sought to have attached to it. After making the statement quoted above

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this court said: "It will then be open under the allegations in the petition for the petitioner to recover the difference between the fair market value of the leasehold, including the improvements, as of the date of the decree, and its value as left after the building of the street to its westerly end, with the elevation of the bed of the railroad at the easterly end, cutting off the use of the spur track." By this was meant that at the new trial the lessee could recover the difference between the value of the leasehold interest in the real estate, including the land, buildings and fixed machinery, before and after the taking. Again on page 599 this court said: "The value of the lessee's option of purchase, provided for in the lease, can neither enhance nor diminish the petitioner's claim, as damages are assessed for injury to its interest as of the date of the taking." If by reason of the statement quoted above the lessee was to recover the whole damage done to the buildings and fixed machinery as if it always had been the sole owner of them, but so far as the land was concerned it was entitled to its leasehold interest only, the court would not have dealt with the option as it did. We are of opinion that under these circumstances the petitioner did not have the right to proceed on the basis that none of the damage done to the buildings and fixed machinery had been included in the verdicts recovered by the lessor on his petitions, and that the whole of it always had belonged to the petitioner and was to be recovered in this action.

The term of the lease to the Cornell-Andrews Company has now expired, and the lessee's right to remove the buildings and fixed machinery and to buy the fee under the option has in the absence of some further agreement come to an end. Some further agreement as to these matters may have been made between the parties. For these reasons it may be that at the new trial it will not be necessary to make the apportionments of the entire sum due for damage to the estate as if it were owned by one person in fee, which would have been originally necessary to preserve all the rights of lessor and lessee.

But if none of these matters has been thus eliminated by subsequent agreements and all the rights of the parties have to be established, the lessor should file an intervening petition covering his interest in the land subject to the lease. It was said by

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Wells, J., in *Edmands* v. *Boston*, 108 Mass. 535, 547: "That statute [Gen. Sts. c. 48, § 17, now R. L. c. 48, § 17] is adapted to cases only in which the relation of tenant for life or years and remainderman exists without modification by contract between the parties or otherwise." The right of the lessee in the case at bar to remove the buildings and fixed machinery as trade fixtures takes this case out of § 17 and brings it within §§ 20–22. At the trial on the lessee's petition and that intervening petition the entire damage done to the land leased to the Cornell-Andrews Company, including the buildings and the fixed machinery put in them by the lessee, must be determined and set forth in the verdict. Then the amount of this entire damage (done to the leased land including the buildings and fixed machinery) must be apportioned between the lessor and lessee. If the lessee suffered any special damage during construction, or if its damage in the matter of access is different from that of the lessor (as seems to have been the case), those sums should be found and set forth in the verdict specially in addition to the sums mentioned above.

A further apportionment should be made of the lessor's share of the whole damage done to the real estate, so that his share of the damage done to the buildings and fixed machinery shall be separate from his share of the damage done to the land in order that the lessee may exercise its right of removing trade fixtures. That right, as we have said, after the taking covers the buildings and fixed machinery, and the damage done to them, including the lessor's share of that damage.

When the petitions are amended so that all damage done to the interests of the lessor and of the lessee in the land covered by the lease is covered by one petition and intervening petition, and the damage done to the lessor's other eight acres is covered by his independent petition, it will be proper to try them all together, as is provided in R. L. c. 48, § 29.

This brings us to a consideration of the questions raised by the petitioner's bill of exceptions.

The presiding judge allowed the respondent to introduce evidence which tended to show that at a comparatively small expense a way could have been constructed connecting the leased land with new Olive Street, and that the value of the land (belong-

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ing to Watson the lessor) covered by the new way would have been small. In his charge the presiding judge instructed the jury that although he could not say that the petitioner was bound or was not bound to attempt to do those things, yet if they were satisfied that the possibility of his doing them would have affected the market value of the leased land (including the buildings and fixed machinery) after the taking, they could take that into account: "The purpose of the evidence is the effect it would have upon the market value of the property, the effect it would have upon the mind of the purchaser or person who desired to purchase the property. Just so far as those possibilities affect the market value of this property you may take them into consideration." Guarded as this evidence was by the instructions given to the jury, it was rightly admitted. See *New York, New Haven & Hartford Railroad* v. *Blacker*, 178 Mass. 386; *Cochrane* v. *Commonwealth*, 175 Mass. 299. The petitioner also took an exception to the judge's refusal to give its seventh, twelfth and thirteenth requests for rulings.* This exception goes to the same point.

The entry must be

Respondent's exceptions sustained; petitioner's exceptions overruled.

J. L. Hall, for the respondent.

J. W. Cummings, (*C. R. Cummings* with him,) for the petitioner.

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* The requested rulings were as follows: "7. There is no evidence that any effort on the part of the petitioner to obtain access to the street was practicable, and the petitioner's damages actually suffered cannot be diminished by the failure to make the attempt to obtain access to the street."

"12. (*a*) There is no evidence in this case that the market value of the petitioner's leasehold and improvements was in any way affected by any probability that the petitioner could buy a way out.

"(*b*) And the jury should not consider such probability if there be any.

"13. (*a*) There is no evidence that the market value of the petitioner's leasehold and improvements was in any way affected by the probability that a way could be got through the County Commissioners.

"(*b*) And the jury should not consider the probability of obtaining the way in such a manner if there be any."

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JOHN P. LEAHY *vs.* STREET COMMISSIONERS OF THE CITY OF BOSTON.

Suffolk. March 13, 1911. — June 20, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Tax, Betterments. *Certiorari*. *Way*, Public: laying out. *Parks and Parkways*. *Columbia Road*. *Words*, "Layout."

Upon a petition for a writ of certiorari to quash the proceedings in assessing upon adjoining land of the petitioner betterments for the laying out and construction of Columbia Road in Boston, it appeared that the portion of Columbia Road on which the land of the petitioner abutted, about sixteen hundred feet in length, in 1892 was taken for a public park by the park commissioners of Boston and was laid out and constructed as a parkway called Dorchesterway under an act which authorized the assessment of betterments, that at that time a settlement was made between the city and the owners, by which a gross sum was paid to the owners and the city agreed to construct a roadway and walk, to which the owners could have access, and the owners made a conveyance to the city upon the condition that if any betterments were assessed upon their remaining land on account of the laying out and construction of the park such betterments should be assumed by the city of Boston. In 1897 the street commissioners of Boston laid out Columbia Road as a highway from Franklin Park to Marine Park, a distance of five miles, which for the sixteen hundred feet referred to was superimposed upon Dorchesterway. All of Dorchesterway, except twenty feet in width, was designated by the order laying out Columbia Road, under statutory authority, as being under the "charge and control" of the park commissioners as a parkway, and no physical change was made in the portion of the Columbia Road adjacent to the petitioner's land which formerly was Dorchesterway. *Held*, that, assuming, for the purposes of decision, that a petition for a writ of certiorari would have been a proper remedy to correct a wrongful assessment of betterments, the fact that Columbia Road for a comparatively short distance happened to be coincident with the pre-existing parkway did not prevent its laying out from being a wholly new one, by which the older and lesser taking was extinguished, and that it could not be said as matter of law that no benefit accrued to the land of the petitioner by reason of the new layout.

RUGG, J. This is a petition for a writ of certiorari * to quash proceedings in assessing certain betterments for the construction of Columbia Road in the city of Boston. The general legality of assessments for Columbia Road was upheld in *Morse* v. *Street Commissioners*, 197 Mass. 292.

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* *Morton*, J., by agreement of the parties reserved the case upon the petition and the return for determination by the full court.

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The present petitioner relies for relief upon these undisputed facts: The portion of Columbia Road where his estates lie, being about sixteen hundred feet in length, was taken in 1892 for a public park by the park commissioners of Boston, and was laid out and constructed as a parkway and called Dorchesterway under an act which authorized the assessment of betterments. A settlement was made between the city and the owners at that time, whereby a gross sum was paid them, and the city agreed to construct a roadway and walk, to which the owners of the estates in perpetuity could have access, and a conveyance was made to the city upon condition that if any betterments were assessed upon their estates on account of the laying out and construction of said park they should be assumed by the city of Boston. In 1897 the street commissioners of Boston laid out Columbia Road as a highway from Franklin Park to Marine Park, a distance of about five miles, which, so far as it affects the petitioner, was superimposed upon Dorchesterway. All of Dorchesterway except twenty feet in width was designated by the order laying out Columbia Road and under the authority of the statute as being under the "charge and control" of the park commissioners as a parkway. No physical change has been made in the portion of Columbia Road adjacent to the petitioner's estate which was formerly Dorchesterway.

It is assumed in favor of the petitioner that this is an appropriate procedure by which to raise the questions argued. See *Weston* v. *Railroad Commissioners*, 205 Mass. 94, 98, and cases cited. Columbia Road was laid out as a single new continuous way throughout its entire length by the action of the street commissioners. Although the words "to lay out" may be of somewhat varying significance dependent upon their context, in this connection they mean to fix the termini and prescribe the boundaries of the highway, and to establish it as a public easement of travel, with all the incidental uses thereby implied, by official act of the lawfully constituted authorities. The grade and the extent, material, manner and time of construction may also be prescribed in the order of layout, though these details are not commonly essential to the validity of an original laying out. *Como* v. *Worcester*, 177 Mass. 543. *Foster* v. *Park Commissioners*, 133 Mass. 321. *Fuller* v. *Mayor & Aldermen of Springfield*,

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123 Mass. 289. *Hitchcock* v. *Aldermen of Springfield*, 121 Mass. 382. *Peabody* v. *Boston & Providence Railroad*, 181 Mass. 76, 81. Because the new way happens for a comparatively short distance to be coincident with a pre-existing way does not prevent it from being a wholly new layout. The old and lesser is swallowed up in the new and larger thoroughfare. The old in this instance was not a full highway, but a parkway subject to its inherent limitations as such. The new way is public in its broad sense, and hence different in kind from that previously existing. The fact that there has been no physical change in the portion of the street upon which the petitioner's land abuts is of no significance. His land is within the territory defined by the statute as liable to a benefit. The assessment is levied not for a particular section of construction, but, for the layout and construction of the road as a whole. The burden of expense is apportioned proportionately on all land within the benefited area as established by the Legislature and not according to the expense of a special part upon adjacent land. The project was an entity, portions of which were perhaps much more expensive than others, but the benefit of being incorporated into this single street unit is assessed, even though some abutting landowners may have much preferred to have been left alone with their former facility of approach, and even though a short section may have been so wrought at an earlier time as to need no change in order to adapt it for the use in the new way.

It is not contended that the question of fact as to the amount of benefit received by the petitioner's estates may be inquired into in this proceeding, but it is urged that it can be said as matter of law that no benefit accrued to the estates of the petitioner by reason of the new layout. This position cannot be supported. Giving full weight to the suggestions arising from the restrictions placed upon lots in the neighborhood designed to preserve them to residential uses and the advantages flowing to houses of that character from location upon a parkway, it does not follow that under no conceivable circumstances could a benefit arise from the establishment of a public way upon the locus of the parkway. It is possible that under some conditions residential estates might receive advantage from abutting upon a long public avenue rather than upon a short parkway. This

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is a question of fact to be tried out in appropriate proceedings, and raises no issue of law upon this record.

Petition dismissed.

J. P. Leahy, (*F. T. Leahy* with him,) for the petitioner.

T. M. Babson, for the respondents.

CHARLES R. BATT & others, executors, *vs.* TREASURER AND RECEIVER GENERAL & others.

Suffolk. March 16, 1911. — June 20, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Bowdoin College. Tax, Exemption, On successions and inheritances. *Charity.*

Rice v. *Bradford*, 180 Mass. 545, holding that property of Bowdoin College was subject to the tax on successions and inheritances imposed by St. 1891, c. 425, necessarily decided that that college was not an institution "incorporated within this Commonwealth" within the meaning of that phrase as used in Rev. Sts. c. 7, § 5, cl. 2, afterwards re-enacted in successive statutes and embodied in R. L. c. 15, § 1.

It seems, that, if the question, whether property of Bowdoin College is exempt from taxation by the laws of this Commonwealth, were an open one, instead of having been settled adversely to the college, this court would hold that, although the college was incorporated by this Commonwealth before St. 1819, c. 36, called the Separation Act, and its charter cannot be modified or changed by the State of Maine, nevertheless after the passage of that act it ceased to be an institution incorporated within this Commonwealth within the meaning of Rev. Sts. c. 7, § 5, cl. 2, and its subsequent re-enactments.

BILL IN EQUITY, filed in the Probate Court for the county of Suffolk on June 13, 1910, by the executors of the will of John C. Coombs, late of Boston, for instructions as to whether the bequest of the remainder of a residuary trust fund, which was given to Bowdoin College in the State of Maine, was subject to pay a succession and inheritance tax under St. 1891, c. 425, R. L. c. 15, § 1, it having been agreed that, if the property was subject to such tax, the amount to be paid to the treasurer of the Commonwealth would be $4,900. The bill alleged that at the time of the death of the testator Bowdoin College was an educational, literary, benevolent, charitable, scientific, and religious institution incorporated within this Commonwealth by a charter

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enacted on June 24, 1794, St. 1794, c. 12, expressly confirmed and continued in full force by St. of 1819, c. 36, known as the Separation Act, and recognized and amended by resolves of June 12, 1820, and April 23, 1891.

In the Probate Court *Grant*, J., upon the authority of *Rice* v. *Bradford*, 180 Mass. 545, ruled that under the provisions of R. L. c. 15, § 1, the legacy was subject to the tax claimed by the treasurer of the Commonwealth, and made a decree to that effect. The executors, Bowdoin College, and Viola V. Coombs, of Bowdoinham in the State of Maine, who was a sister of the testator and a legatee, appealed.

The appeal came on to be heard before *Hammond*, J., who with the consent of the parties reserved it for determination by the full court.

E. P. Payson, for the executors, stated the case.

F. T. Field, Assistant Attorney General, for the Treasurer and Receiver General.

W. P. Thompson, for Bowdoin College.

MORTON, J. We do not see why, notwithstanding the elaborate arguments that have been addressed to us by the executors and by Bowdoin College, the case of *Rice* v. *Bradford*, 180 Mass. 545, is not decisive of the case at bar.

It is true that Bowdoin College was not a party to that suit and that the effect of the words "incorporated within this Commonwealth" in R. L. c. 12, § 5, cl. 3, was not the subject of extended examination in the opinion that was rendered. But the case itself involved the precise question now presented, namely, whether a legacy, given by a resident of this State to the President and Fellows of Bowdoin College in the State of Maine, was exempt from taxation under St. 1891, c. 425, now embodied in R. L. c. 15. The case was a bill for instructions by the executor of the will, and the bill alleged that Bowdoin College was a corporation created by this Commonwealth, by the act of June 24, 1794, and that it was an educational and charitable institution which should be exempt from taxation under St. 1891, c. 425. The treasurer and receiver general answered alleging that a tax was due and the court so held. Manifestly, if the college was an institution incorporated within this Commonwealth within the meaning of the statute, the legacy was exempt

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from taxation, otherwise not, and it necessarily must have been decided in that case, in order to render the legacy taxable, that the college was not an institution incorporated within this Commonwealth within the meaning of the statute. If the question were an open one we should have no doubt that the legacy in question was subject to a tax, and that although the college was incorporated by this Commonwealth before the passage of the Separation Act, so called (St. 1819, c. 36), and its charter cannot be modified or changed by the State of Maine, nevertheless after the passage of the act it ceased to be an institution incorporated within this Commonwealth within the meaning of Rev. Sts. c. 7, § 5, cl. 2, and its subsequent re-enactments. It is not necessary however to go into the consideration of the question now, and what we have said is more for the purpose of preventing a possible implication that if it were not for the case of *Rice* v. *Bradford*, *supra*, there might have been some doubt about the validity of the tax.

Decree affirmed.

ATTORNEY GENERAL *vs.* ANN RAFFERTY, administratrix.

Suffolk. March 20, 1911. — June 20, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Tax, On successions and inheritances. *Probate Court. Judgment.*

A decree of the Probate Court, allowing the accounts of an administrator and ordering a distribution of the estate of his intestate, where there was no reference in the proceedings to an inheritance tax and no provision was made for its payment and the Commonwealth was not made a party to the proceedings by its consent or in the manner provided by St. 1891, c. 425, § 18, is no defense to an information by the Attorney General at the relation of the treasurer and receiver general for the collection of an inheritance tax to which the estate is subject under the provisions of St. 1891, c. 425. Following *Attorney General* v. *Stone*, *ante*, 186.

INFROMATION, filed in the Supreme Judicial Court on January 18, 1910, by the Attorney General, at the relation of the Treasurer and Receiver General against the administratrix of the estate of Alice Cumiskey, late of Boston, who died on March 12, 1892, alleging that $538.68 with interest was due from the

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defendant to the Commonwealth as collateral legacy and succession taxes under the provisions of St. 1891, c. 425.

The case was submitted upon an agreed statement of facts to *Rugg*, J., who made a decree for the Attorney General in the sum of $1,078.53. The defendant appealed.

The case was submitted on briefs.

J. P. Leahy & F. T. Leahy, for the defendant.

J. M. Swift, Attorney General, & *A. Marshall*, Assistant Attorney General, for the plaintiff.

MORTON, J. The defendant admits that some of the property distributed by her was subject to an inheritance tax under St. 1891, c. 425, and that the tax has never been paid. She contends that she is protected from liability by the decrees of distribution of the Probate Court under which she acted. It is not disputed that the Probate Court had jurisdiction of the estate and we assume in the defendant's favor that the decrees of distribution and the decrees allowing her accounts were all properly entered, and that she acted in good faith. No reference was made to the inheritance tax in any of the proceedings. Since this case was argued the case of *Attorney General* v. *Stone*, *ante*, 186, has been decided. The precise point here raised was the subject of consideration in that case, and was determined adversely to the defendant's contention. It is unnecessary, we think, to do more than refer to that case. We may add that no question is raised in regard to interest, and we have no means of knowing whether it was computed in this case according to the rule laid down in that case or not.

Decree affirmed.

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ABBY POPE & others, executors, *vs.* FREEMAN HINCKLEY, trustee, & others.

Norfolk. March 22, 1911. — June 20, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Devise and Legacy, Ademption. *Corporation*, Reorganization. *Executor and Administrator*. *Charity*. *Words*, "Trustees."

A testator by his will gave numerous legacies of shares of the first preferred stock of a certain corporation. About a year later he executed a codicil, which did not change this part of his will, and three years after that he died. At the date of his will he was the holder of a very large number of shares of the first preferred stock of the corporation and at the date of the codicil this number had been increased. The corporation was organized under the laws of New Jersey. About a year after the execution of the codicil and about two years before the testator's death the corporation passed into the hands of a receiver in New Jersey. In the interest of the testator and such other stockholders as chose to come in for the purpose of acquiring the assets and succeeding to the business of the New Jersey corporation, a new corporation was organized under the laws of Connecticut, to which, after payment by the receiver of all the obligations of the New Jersey corporation and the expenses of the receivership, the remaining assets were conveyed by the receiver about nine months before the testator's death under an order of the New Jersey court, and about a month later a decree was made which dissolved the New Jersey corporation and under a statute of that State declared its charter to be forfeited and void. The testator and other stockholders of the New Jersey corporation deposited their stock with a certain trust company, which issued to them negotiable voting trust certificates, which were to be exchanged for stock in the new corporation in accordance with a stated ratio. The exchange was not effected during the testator's lifetime, but was made by his executors shortly after his death pursuant to the prearranged scheme. Seven days before the testator's death a decree was entered by the New Jersey court that there should be paid to persons, who had not deposited or should not deposit their first preferred stock in the New Jersey corporation but had elected to take cash therefor, a dividend of a certain amount of money on each share of the first preferred stock. On the day of the death of the testator, an order was entered discharging the receiver from any further duty or responsibility and terminating the receivership. *Held*, that the legacies of shares of the first preferred stock of the New Jersey corporation were not adeemed by what took place before the death of the testator, and that they took effect subject to such engagements as the testator had entered into in regard to the reorganization of the corporation and the surrender and exchange of the stock bequeathed, because, although the New Jersey corporation had been dissolved, the testator at the time of his death still held the shares of stock in the defunct corporation, which gave him corresponding rights to stock in the new corporation; and therefore that the legacies were to be satisfied by the transfer to the legatees of the number of shares of the stock in the Connecticut corporation to which the testator would have been entitled by virtue of the number of shares of the first preferred stock in the New Jersey corpora-

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tion respectively named in such legacies, it being immaterial and unnecessary to decide whether the legacies were to be regarded as general or specific.

A direction by a testator in his will that certain legacies, together with all other bequests in his will, shall "be paid within three years from the probating of this will at the discretion of the trustees" is a direction to the executors of the will, the word "trustees" manifestly being used inadvertently, and is a direction that the legacies are to be paid in three years from the probate of the will or sooner at the discretion of the executors.

A legacy to a certain charity, called a mission, with a provision that it "is not to take effect unless" a person named "be alive and have charge of said mission at the time of" the testator's death, lapses if the person named has died during the testator's lifetime.

A legacy was given to the "Fresh Air Fund now under the charge of W." It appeared that W. was in charge of a department of the City Missionary Society of Boston called the "Fresh Air Fund." *Held*, that the legacy should be paid to the City Missionary Society of Boston to be used in the department designated.

A legacy given to "the Library Fund of the Massachusetts Commandery of the Military Order of the Loyal Legion of the United States" was held to be payable to "the Commandery of Massachusetts, Military Order of the Loyal Legion of the United States," to be used and applied for library purposes.

MORTON, J. This is a bill for instructions by the executors of the will and codicil of Albert A. Pope. The case was reserved* for the full court on the bill, answers and agreed facts, such decree to be entered as justice and equity may require.

The will was dated June 16, 1905, and the codicil May 28, 1906. The testator died August 10, 1909. At the date of the will he was the owner and holder of four thousand nine hundred and sixty-eight shares of the first preferred stock of the Pope Manufacturing Company, a New Jersey corporation with its principal office in Jersey City and its general offices in Hartford, Connecticut, and sixteen thousand four hundred and fifty shares of the second preferred stock and sixty-four thousand and twenty-four shares of the common stock. At the date of the codicil his holdings of first and second preferred stock had been somewhat increased. Those of the common stock remained the same. By his will, which in this respect was not changed by the codicil, the testator gave numerous legacies of shares of the first preferred stock, four hundred and eighty shares in all, to various persons and corporations. In August, 1907, after the execution of the codicil and about two years before the testator's death, the corporation passed into the hands of receivers under proceedings begun, prosecuted and concluded in New Jersey. In

* By *Hammond*, J.

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consequence thereof another corporation was organized on or about December 12, 1908, under the laws of Connecticut, to which, after payment by the receivers of all the obligations of the New Jersey corporation and of the expenses of the receivership, the remaining assets were duly conveyed by the receivers pursuant to an order of the New Jersey court authorizing the same, dated November 19, 1908, and a decree dated December 29, 1908, was entered dissolving the corporation, and, in accordance with the statute in New Jersey, declaring its charter forfeited and void.

The Connecticut corporation was formed in the interest of the testator and of such other stockholders of the New Jersey corporation as chose to come in for the purpose of acquiring the assets and succeeding to and carrying on the business of the New Jersey corporation. Pending the receivership proceedings and for the purpose of carrying out the plans thus instituted, the testator and other stockholders in the New Jersey corporation deposited their stock with the Central Trust Company of New York, and that company issued to them negotiable voting trust certificates which were to be exchanged, and which eventually were exchanged, for stock in the new corporation at the rate of ten shares of first preferred stock of the New Jersey corporation for seven and one half shares of the preferred stock and eight and three tenths shares of the common stock of the new corporation; and at the rate of ten shares of the second preferred stock of the New Jersey corporation for two shares of the common stock of the new corporation. The exchange was not made by the testator during his lifetime, but was made by his executors shortly after his death, pursuant to the scheme that he and other stockholders of the New Jersey corporation had thus entered into. The number of shares in the new corporation received by the executors was four thousand and ninety and one-half shares of the preferred stock and six thousand four hundred and fifty-eight and eighty-two one-hundredths shares of the common stock, and they still hold these shares with the exception of the fractions, which have been sold. Trust certificates representing two thousand shares of the common stock of the new corporation had been sold by the conservator of the testator before his death by order of the Probate Court of Norfolk County. Subsequent to the decree

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dissolving the New Jersey corporation, a decree was entered on August 3, 1909, that there should be paid to the persons who had not deposited or should not deposit their first preferred stock with the Central Trust Company, but elected to take cash therefor, a dividend of $41.277 on each share of the first preferred stock of the New Jersey corporation, which the court found to be the value thereof based on the assets of the corporation after the payment of all its obligations and of the expenses of the receivership. Shortly afterwards, on August 10, 1909, an order was entered discharging the receivers from any further duty or responsibility in respect to their trust as receivers and thus terminating the receivership. The capital stock of the New Jersey corporation was $22,500,000, consisting of $2,500,000 first preferred stock, $10,000,000 of second preferred stock, and $10,000,000 of common stock. The capital stock of the new corporation is $6,500,000, of which $2,500,000 is preferred stock and $4,000,000 is common stock.

The first and principal question on which the executors desire instructions is whether the legacies of shares of the Pope Manufacturing Company of New Jersey were adeemed by what took place during the testator's lifetime, and if they were not, in what manner and on what basis the legacies shall be satisfied.

It is obvious, we think, that what took place was in substance and effect a reorganization under the laws of Connecticut and on a somewhat different footing of the New Jersey corporation with a liquidation in favor of creditors and those stockholders who did not care to come into the reorganization scheme. It is spoken of as a reorganization in the plan that was submitted to the stockholders and in the agreements that were entered into between the reorganization committee and the stockholders and between the reorganization committee and the voting trustees. Pending the receivership and the reorganization, the testator and other stockholders deposited their stock, in accordance with the reorganization scheme, with the Central Trust Company of New York, receiving in return therefor negotiable voting trust certificates. This evidently was done to secure the carrying out of the scheme if a sufficient number of stockholders assented to it, and as one step in the transmutation of stock in the old company into stock in the new. So far as the trust company ac-

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quired any right or title to the stock thus deposited, it was only for the purpose of carrying out the reorganization scheme. If the scheme failed for any reason, then the stock was to be returned to the depositors. Subject to such rights therein as the trust company and other stockholders and the committees acting for them acquired by the engagements that they entered into respecting the reorganization, the right and title to the stock so deposited remained with the stockholders depositing the same. Those stockholders who had not become parties to the organization scheme held their stock, of course, free from any such obligations. When, therefore, the testator died and his will and codicil took effect he still held, in a sense at least, first preferred stock in the New Jersey corporation. Nothing had occurred, we think, which should be regarded as an ademption of the legacies of such stock. It is true that the New Jersey corporation had been dissolved, but it was not dissolved until after the new corporation had been organized, and the testator's rights to stock in the new corporation depended upon his continued recognition as a stockholder in the defunct corporation. The exchange by the executors of the voting trust certificates for shares in the new corporation was an exchange of something which derived its whole value and significance from the fact that it represented first preferred stock in the New Jersey corporation notwithstanding that corporation had been dissolved. We think, therefore, that the legacies of first preferred stock in the New Jersey corporation must be deemed to have taken effect subject to such engagements as the testator had entered into in regard to the reorganization and in regard to the surrender and exchange of first preferred stock in the New Jersey corporation for preferred stock in the new company. When that exchange was effected by the executors, the preferred stock of the Connecticut corporation stood to all intents and purposes, so far as legacies of the first preferred stock in the New Jersey corporation were concerned, in the place of that stock as far as that stock went. A view similar to that which we have expressed above as to the effect of a reorganization on the rights of the original stockholders was taken in *In re Rhoades*, 190 N. Y. 525, where an order of the Appellate Division of the Supreme Court in the first judicial department affirming the

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order of the New York County Surrogate's Court was affirmed without an opinion.

It follows that the legacies in question are to be satisfied by the transfer to the various persons and corporations to whom they were given of the number of shares of preferred and common stock in the Connecticut corporation to which the testator would have been entitled by virtue of the number of first preferred shares in the New Jersey corporation named in such legacies. It follows also from what we have said that it is immaterial whether the legacies are to be regarded as general or specific, though they would seem to be general rather than specific. No particular shares of preferred stock are indicated in the various legacies, but only so many in each case out of the larger number belonging to the testator are given to each legatee. *Thayer* v. *Paulding*, 200 Mass. 98. *Slade* v. *Talbot*, 182 Mass. 256. We do not see how the testator's expressed desire that "the holdings of the above named Pope Manufacturing Company's securities should be continued intact so long as my sons shall be in active connection with or control of said Pope Manufacturing Company," even if construed to include the legacies in question, tends to make them specific.

The testator directs that the legacies in question "together with all other bequests herein named" (i. e. in his will) shall "be paid within three (3) years from the probating of this will at the discretion of the trustees." This means, we think, that the legacies are to be paid in three years from the probate of the will or sooner at the discretion of the executors. The word "trustees" is manifestly used inadvertently for "executors."

The legacy to Parker's Boston Helping Hand Mission "is not to take effect unless George W. Parker be alive and have charge of said Mission at the time of my [the testator's] death." It is stated in the petition and admitted by the answer that Mr. Parker died during the testator's lifetime. The condition on which the legacy was to take effect having failed, the legacy must be held to have lapsed.

The legacy given to the "Fresh Air Fund now under the charge of D. W. Waldron" should be paid over, we think, to the City Missionary Society of Boston, whereof the "Fresh Air

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Fund," as it appears, is a department of which said D. W. Waldron is manager, to be used for that department.

The legacy given to "the Library Fund of the Massachusetts Commandery of the Military Order of the Loyal Legion of the United States" should be paid over to "The Commandery of Massachusetts, Military Order of the Loyal Legion of the United States," to be used and applied for library purposes.

Decree accordingly.

M. F. Dickinson, for the executors, stated the case.

W. B. Farr, for the trustee Hinckley and others.

A. S. Hall, for Berea College.

C. E. Gross (of Connecticut), for himself as trustee and his associate trustees.

JOHN C. PHILLIPS & others *vs.* CITY OF BOSTON.

Suffolk. March 31, 1911. — June 20, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Tax, Assessments for betterments. *Parks and Parkways. Columbia Road. Equity Jurisdiction*, To enforce against city agreement to assume betterment assessment.

A deed given to the city of Boston by the owner of land which the board of park commissioners of that city in 1890 had taken for park purposes, contained the following: "This conveyance is made upon the express condition that if any betterments are assessed upon the estates belonging to the" landowner "on account of the laying out and construction of said park, said betterments shall be assumed by said city of Boston." A parkway called the Strandway was constructed adjacent to the remaining land of the landowner and, at the time of the taking by the park commissioners and of the execution of the deed by the landowner, the park commissioners contemplated a system of parkways of which the Strandway should form a link, connecting Marine Park at South Boston with Franklin Park. But the scheme was changed, and under authority given by St. 1897, c. 394, the street commissioners of the city of Boston laid out Columbia Road as a public highway, about five miles in length, from Franklin Park to Marine Park, and included as a part of it the Strandway, which by an order of the street commissioners under authority given them by the statute was placed under the "charge and control" of the board of park commissioners. No change was made in the physical appearance of the Strandway so far as it was included within the layout of Columbia Road, and the only change wrought by the layout was to open one of the drives of the Strandway to general traffic instead of leaving it restricted as a parkway. The board of street commissioners levied a betterment assessment on the remaining land of the landowner on ac-

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count of the laying out and construction of Columbia Road. The landowner brought a suit in equity against the city of Boston, to compel it to assume this assessment under the condition or agreement, quoted above, in the deed accepted by the city. *Held*, that, assuming that a suit in equity was the proper remedy to enforce the terms of the deed, which was not decided, the assessment by the street commissioners for the laying out and construction of Columbia Road as a highway was not within the terms of the deed, which related only to assessments for the laying out and construction of a park by the park commissioners.

RUGG, J. This is a suit in equity * to compel the city of Boston to assume certain betterment assessments levied on account of the laying out and construction of Columbia Road, upon which the plaintiffs' land abuts. In 1890 the board of park commissioners of the city of Boston took a considerable tract of land, including some belonging to the petitioners, for park purposes. A settlement was made between the plaintiffs and the city for the damages occasioned by such taking, as a part of which a deed was executed by the plaintiffs to the defendant which contained this provision: "This conveyance is made upon the express condition that if any betterments are assessed upon the estates belonging to said minors [the plaintiffs] on account of the laying out and construction of said park, said betterments shall be assumed by said city of Boston. And for the above named consideration and the further consideration that said city of Boston shall construct along the boundary line of said park, within the said parcels of land, a roadway and walk, to which said minors [the plaintiffs] and their heirs and assigns . . . shall have free access with the right to use the same for the purposes of a way subject to such reasonable rules and regulations, as may from time to time be made by the park commissioners of said city, we hereby . . . covenant with said city of Boston, that they . . . will hold their remaining land abutting upon said park and to a distance of one hundred feet from . . . park line, subject to the following restrictions" which limited the uses to which the remaining property could be put and the nature and position of buildings to be erected thereon.

* The bill as amended was filed in the Superior Court on January 30, 1909. The case was reserved by *Dana*, J., upon the amended bill, the answer, the replication and an agreed statement of facts, for determination by this court.

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While this settlement perhaps did not technically follow St. 1884, c. 226 (see now R. L. c. 50, § 11, as amended by St. 1902, c. 503; *Atkinson* v. *Newton*, 169 Mass. 240), it was within its general scope. Pursuant to this taking and agreement a parkway called the Strandway was constructed adjacent to the petitioners' estates. At the time of the taking by the park commissioners and the execution of the deed from the plaintiffs, it was within the contemplation of the park commissioners that a comprehensive park system should be established in the southerly portion of the city of Boston to be connected by a series of parkways, and that such a way should ultimately connect Marine Park in South Boston with Franklin Park, of which the Strandway should constitute a link. This scheme was changed, and by St. 1897, c. 394, the street commissioners of the city of Boston were authorized to lay out and construct a highway connecting these two parks. Acting under this statute the street commissioners of the city laid out Columbia Road as a public way, about five miles in length, from Franklin Park to Marine Park, a part of which was coincident with the Strandway. In accordance with the power conferred by said statute, the Strandway was designated to be under the "charge and control" of the board of park commissioners, except a part forty-two feet in width on the northerly side. No change was made in the physical appearance of the Strandway so far as included within the layout of Columbia Road, and the only change wrought by the layout was to convert one of its roads or drives into a general traffic way, whereas formerly its whole width was a parkway and could be used only under the regulations of the park commissioners. A comparatively small amount of construction work was done upon the Strandway in order to adapt it for use as a part of Columbia Road.

The general validity of the assessment levied for the construction of Columbia Road was sustained in *Morse* v. *Street Commissioners*, 197 Mass. 292. It is the contention of the plaintiffs that the levying of such an assessment is in violation of the clause above quoted in their deed to the defendant. Their bill is framed on the theory that the defendant can be compelled by a proceeding in equity to comply with the terms of this deed and assume the payment of the betterments thus assessed. We assume in

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favor of the plaintiffs, but without deciding, that in a proper case this remedy would be open to them. See *Kelley* v. *Barton*, 174 Mass. 396; *Bartlett* v. *Boston*, 182 Mass. 460; *Bell* v. *Newton*, 183 Mass. 481; *Raymond* v. *Chicago Union Traction Co.* 207 U. S. 20.

The present assessment is not within the terms of the deed of the plaintiffs. The words of this deed related to a particular assessment, namely, that arising from the laying out of the park. That was a definite act executed by a certain public board. In no proper sense can it be said that this specific proceeding had any connection, even remote, with the construction of Columbia Road. The fact that the park commissioners at that time had thought about the connection of the land conveyed by the deed in which the covenant occurs with other public parks by parkways imposed no binding obligation upon them, and conferred no legal rights upon the plaintiffs. It existed only as a project, which might be modified in the light of exigencies of administration or of increased knowledge or of a more comprehensive scheme for municipal development. It might have been wholly abandoned without incurring any liability. It is not mentioned in the deed, and the plaintiffs could have maintained no bill for the specific performance of such a plan, which of necessity must depend for its execution upon financial and administrative considerations beyond the control of the park commissioners. Nearly six years after the execution of the deed * relied upon, the Legislature interposed and conferred a power, not theretofore existing, upon an independent board of public officers. By virtue of this new authority a way different in kind from that contemplated by the deed was constructed, and incorporated within its extended boundaries was the comparatively short parkway upon which the plaintiffs' premises abut. The language of the deed does not purport to project itself against a future assessment arising out of an improvement not yet begun.

This deed dealt by its express terms with an existing lien for betterments growing out of an accomplished public improvement, the amount of which alone remained to be determined, and with nothing else. The assessment, which is now complained of, was

* The taking by the park commissioners for the Strandway was on April 30, 1890. The deed was dated August 4, 1891. St. 1897, c. 394, was passed and took effect on May 13, 1897.

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not levied by reason of the establishment of a park or a parkway, but for the benefit accruing from the layout of a thoroughfare of great length open as a public highway to all kinds of traffic, and not restricted or limited by the regulations of the park commissioners except as to portions relegated to their care. This assessment is laid, therefore, for a public improvement of a nature different from that covered by the settlement of which the deed was a part. It may be assumed that no more than a single betterment assessment can be levied upon the same estate for the same public improvement, but that is not the point here presented for decision. It is of no consequence that no substantial change was made in the physical appearance of the Strandway in front of the plaintiffs' estate, or that little work of construction was needed to fit it for use as a part of the new thoroughfare. *Leahy* v. *Street Commissioners*, *ante*, 316.

Whether the assessment levied exceeds the benefits which accrue to the plaintiffs' estates by reason of the layout of Columbia Road is a matter determinable only in appropriate proceedings for abatement.

Bill dismissed.

B. E. Eames, for the plaintiffs.

T. M. Babson, for the defendant, was not called upon.

NORTH ANSON LUMBER COMPANY *vs.* HERBERT L. SMITH, administrator.

Middlesex. December 6, 1910. — June 21, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, SHELDON, & RUGG, JJ.

Corporation, Powers, By-laws. *Bills and Notes*, Indorsement, Payment. *Contract*, Implied in fact, Validity. *Evidence*, Circumstantial, Presumptions and burden of proof.

A business corporation has power to agree to reimburse the maker of a note which he is to sign for its benefit.

A business corporation may be bound by a contract, which can be inferred from its corporate acts and other facts without any direct evidence of the existence or terms of the contract.

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In an action by a corporation against an administrator, on certain promissory notes made by the defendant's intestate, it appeared that the intestate at the time he signed the notes was the president and a stockholder of the plaintiff, that the notes were payable to the owner of certain property which was received and used by the plaintiff and not by the defendant's intestate, who received no consideration for the notes unless it was an agreement of the plaintiff to hold him harmless from liability upon them, that the notes after maturity were indorsed in blank without recourse and were delivered to the plaintiff, whereupon the plaintiff, which was not a party to them and had not guaranteed their payment, paid the notes and entered the transaction on its books as "notes paid." *Held*, that from the evidence a contract of the plaintiff with the intestate to assume the payment of the notes could be inferred, that the conduct of the plaintiff through its officers was susceptible of the construction that the plaintiff in paying the notes was paying its own debt, which thereby became extinguished, and that the indorsement was a mere form which did not transfer an outstanding obligation, so that the case was for the jury and a verdict properly could not be ordered for the plaintiff.

The fact, that a corporation has a by-law to the effect that no agreements involving the payment of a certain amount of money shall be valid without a vote of the board of directors, does not prevent the corporation from being held liable on a contract to pay a larger amount of money than that named in the by-law which, by inference from corporate acts, may be shown to have been made, and which may be presumed to have been made under adequate authority.

RUGG, J. This is an action to recover one half the principal and interest of eight promissory notes made by the defendant's intestate jointly with James E. Freeman and Charles T. Leavitt and payable to the order of Emery Porter and Company. At or after maturity they were indorsed in blank without recourse and delivered to the plaintiff.

The circumstances of the transaction appear not to have been much in dispute, and might have been found to be these: Emery Porter and Company owned a saw mill in North Anson, Maine, in 1905, and substantially all the capital stock of the North Anson Water Power and Improvement Company, a corporation authorized to develop and dispose of water power, together with a large quantity of logs and timber. As a result of several agreements, Freeman, Smith and Leavitt purchased the timber and logs, and took a bond for a conveyance of the mill property and stock in the water power company, entered into possession of all the real and personal property, and started to carry on the business of sawing and selling lumber. They decided to form a corporation to be called the North Anson Lumber Company. Notes of the proposed corporation were proffered in part payment of the real and personal property, but these were refused

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by the sellers, who insisted upon notes signed by the individual purchasers. In payment for the property and for starting the business, Freeman and the defendant's intestate each advanced $6,000, and signed the eight notes here in suit. On April 10, 1905, the plaintiff corporation was organized by Freeman, Smith and Leavitt, who had previously to that time conducted the business under that name. Leavitt, although participating in the organization, went no further in the enterprise, furnished no money, and drops out of the case. Upon its incorporation the North Anson Lumber Company took over the business, previously conducted by Freeman, Smith and Leavitt, as a going concern, and substantially all the property bought by them of Emery Porter and Company, but no change whatever was made in the way it was carried on. There was no formal offer of sale by Freeman, Smith and Leavitt, or acceptance by the corporation, or transfer of title to property, but the corporation simply took possession of and used in its own business from that time on all the property purchased. The logs were sawed into lumber and sold by the plaintiff in ordinary course of trade, and the proceeds all went into its treasury. The books originally opened by Freeman, Smith and Leavitt were continued without change or interruption by the plaintiff corporation, and no distinction was made as to the business conducted before and after the date of the incorporation. The corporation entered into possession of the real estate described in the bond. The defendant's intestate was the first president of the company, but after a few months his mind failed, and a conservator was appointed who cared for his estate until his death. Freeman has always been the treasurer of the plaintiff, and, after the incapacity of the defendant's intestate, became also its president, and has been exclusively in charge of its affairs as general manager. After the incorporation, certificates of stock were issued to Freeman and to the defendant's intestate for one hundred and twenty-five shares each, although up to that time each had contributed only $6,000. In January, 1906, Freeman, in whose custody the Smith certificate had been placed, multilated it and issued a new one for sixty shares, which corresponded at par with the cash he had paid in, making an entry upon the stub in the stock book that "the balance sixty-five shares were never

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paid for." Six of the eight notes now in suit were paid on or about their maturity by the plaintiff with its own money, and were at Freeman's request surrendered to him after being indorsed without recourse by the payees. It was contended by the plaintiff that Freeman had paid one half these notes, and it seeks to recover from the defendant only the remaining half, this being based upon the testimony of Freeman that he and the defendant's intestate had an understanding that each was to pay one half the notes and take stock in the corporation to an equal amount. Freeman, however, did not testify that he paid the notes or one half of them with his own money, but that he had paid money into the treasury of the plaintiff as he was able and had taken stock for it. He was unable to point however to any specific payments to this end or to any entries upon the books of the plaintiff of money paid to it for the purpose of meeting these notes, or which corresponded to the date of the payments. The entries upon the books of the corporation show that all the notes, except the two given for the real estate and Water Power Company stock, were paid with moneys of the corporation and entered on its note account as "notes paid." These two notes were not paid at maturity, but the sellers of the real estate, who held the notes, did not press for payment, and after the lapse of a year or more made a conveyance to the plaintiff of the real estate, and assigned to it the Water Power Company stock, in return for which the plaintiff, consolidating the amount of these notes with the other indebtedness not connected with this action, owed by it to Emery Porter and Company, gave that firm its own new notes secured by mortgage bonds upon its real estate. This conveyance, although not a compliance with the bond given by Emery Porter and Company to Freeman, Smith and Leavitt, was in conformity to it as to price, and allowed credit for the cash originally contributed by Freeman and Smith, and thereby Emery Porter and Company incapacitated themselves from carrying out the terms of the agreement with the original contractors. No demand was made upon the defendant's intestate or his conservator or administrator for the payment of any part of any of these notes until a short time before this action was brought. On two occasions, when there would have been strong ground to expect Freeman

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to speak of the liability of the defendant's intestate on the notes if it had existed, he said nothing about it, and in one or two letters written to the defendant, Freeman requested him to raise some money for the plaintiff for the sake of protecting his existing interest as stockholder, without referring to any indebtedness. At the conclusion of the evidence in the Superior Court the jury were directed * to return a verdict for the plaintiff.

We are of opinion that this was error. The plaintiff could not recover if it had recognized and adopted the notes as its own obligations and had agreed to hold the defendant harmless thereon, and was not in truth a holder of them for value. This is not a case where one undertakes to recover of a corporation upon a contract fully made with some one else before the existence of the corporation for its benefit, and never afterwards assumed by it in such a way as to indicate a new contractual element arising after the incorporation. Hence the principle followed in cases like *Koppel* v. *Massachusetts Brick Co.* 192 Mass. 223, *Penn Match Co.* v. *Hapgood*, 141 Mass. 145, *Abbott* v. *Hapgood*, 150 Mass. 248, 252, *Pennell* v. *Lathrop*, 191 Mass. 357, and *Whiting & Sons Co.* v. *Barton*, 204 Mass. 169, is not controlling.

But this is a case where the defense is set up that the plaintiff corporation, after its organization, which was subsequent to the initial transaction, entered into such relations with the makers of the notes that a contract to assume the payment of their notes may be implied, and that other circumstances warrant the further inference that this implied contract has been executed. These relations are the receipt by the plaintiff of valuable property and business from the makers of the notes, for which no adequate consideration was paid, unless there was an agreement to hold the makers harmless on these notes. No claim has been or could be put forward successfully that a contract of this nature was beyond the power of the plaintiff. The property thus received was that which it needed to do business. The only question is whether there was evidence to support a finding that such a contract was made. A business corporation may be bound by inferences from facts and corpo-

* By *Pierce*, J.

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rate acts, which point to the existence of an implied agreement as their rational explanation, as well as by a formal vote. In this respect it does not differ from a natural person. By accepting all the benefits of a negotiation made in its behalf and by taking advantage of arrangements which are in its interest, an implication of adoption of the incidental burdens may arise against a corporation. Failure to repudiate after knowledge may signify corporate approval or ratification. *Proprietors of Canal Bridge* v. *Gordon*, 1 Pick. 296. *Beacon Trust Co.* v. *Souther*, 183 Mass. 413. *Nims* v. *Mount Hermon Boys' School*, 160 Mass. 177. The circumstances upon which such a conclusion may be founded in the case at bar are that the plaintiff received without other consideration than such an agreement the proportional part of its original stock in trade and plant (which was by far the larger part) represented by the purchasing power of these notes, and that it paid all the notes at or after maturity, by its own checks or notes, although it was not a party to them and had in no way guaranteed their payment, and entered the transactions upon its books as "notes paid." Confirmation of this inference may be found in the fact that although stock in the plaintiff at par was issued to Freeman and Smith for the cash paid by them toward the purchase price of the property with which the plaintiff began business, no stock was issued to them for the amount of the notes. Moreover no stock of the plaintiff was reserved to be used for the purpose of being issued to the defendant, the entire capital stock having been issued. The conduct of the plaintiff and its officers as to the notes is also susceptible of the construction that it was merely paying that which was in substance, as between it and the defendant, its own debt, and which thereby became extinguished, and that the indorsement was a mere form and not a transfer of an outstanding obligation.

The by-law of the plaintiff, to the effect that no agreement involving so large an amount of money should be valid without vote of the board of directors, does not prevent the establishment of a contract by inference from corporate acts, which may be presumed to have been performed under appropriate authority. *Produce Exchange Trust Co.* v. *Bieberbach*, 176 Mass. 577, 582.

In view of all the evidence it could not properly have been

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ruled as matter of law that the only rational conclusion from it possible was that the plaintiff was entitled to recover.

Exceptions sustained.

W. W. Stover, (*W. P. Lombard* with him,) for the defendant.

C. F. Choate, Jr., (*J. H. Stone* with him,) for the plaintiff.

HENRY A. BANGS *vs.* FRED J. FARR.

SAME *vs.* SAME.

Suffolk. January 9, 1911. — June 21, 1911.

Present: KNOWLTON, C. J., LORING, BRALEY, SHELDON, & RUGG, JJ.

Practice, Civil, Findings of judge, Exceptions, Rulings. *Damages*, Speculative. *Evidence*, Presumptions and burden of proof.

Although the findings of fact made by a trial judge have the same effect as the verdict of a jury and only can be set aside when they are without any foundation in the evidence, yet where, so far as appears upon the printed record before this court, a finding of a judge rests merely upon conjecture, an exception to a refusal to rule that it was not warranted by the evidence will be sustained.

In an action for the alleged breach of a contract in writing, by which the plaintiff, who was the exclusive agent of the manufacturer for the sale in New England of a certain kind of automobile and was authorized to establish sub-agencies, agreed with the defendant to sell him these automobiles at a discount of ten per cent, and the defendant agreed to devote his entire time between January 1 and September 30, 1906, to selling these automobiles and to have no business with the manufacturer except through the plaintiff, where damages were claimed on the ground that they were caused by the failure of the defendant to devote all his time to the sale of the automobiles during the whole of the specified period, and there was no evidence as to prospective customers but there was evidence showing an inability or indisposition on the part of the manufacturer to fill orders promptly, the question whether, in view of the newness of the venture and of its dependence upon the temperament, energy and perseverance of the defendant and the performance by the plaintiff of his contract with the manufacturer, the assessment of any damages would not be too speculative to be allowed, here was referred to as one which it was not necessary to determine.

An exception to the refusal by a judge, before whom a case was tried without a jury, to make rulings which were inapplicable to the evidence or which were contrary to his findings of fact upon conflicting or unreported evidence, cannot be sustained.

In an action for the alleged breach of a contract in writing, by which the plaintiff, who was the exclusive agent of the manufacturer for the sale in New England of a certain kind of automobile and was authorized to establish sub-agencies, agreed with the defendant to sell him these automobiles at a discount of ten per cent, and the defendant agreed to devote his entire time during a specified

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period to selling these automobiles and to have no business with the manufacturer except through the plaintiff, the defense, that the written contract between the parties was waived and that the relation of principal and agent was substituted for it, is an affirmative one, and if the defendant sets it up the burden is on him to prove it.

At the trial of an action at law before a judge, sitting without a jury, a party has a right by the seasonable presentation of appropriate requests for rulings to learn the principles of law which the judge is to apply in reaching his conclusions, and, where such requests are sound in law, pertinent to the issues and applicable to the evidence, it is the duty of the judge to grant them and to follow the rulings thus made in arriving at his decision; but to obtain such a ruling the party who wants it made must request it himself, and he cannot complain or except because, after the opposing party had presented to the judge requests for rulings, he withdrew them with the assent of the judge and they were not passed upon.

RUGG, J. These are two actions, by which the plaintiff seeks to recover damages for breaches of a written contract. The plaintiff was the exclusive agent of the manufacturer for the sale of certain automobiles in New England, and was authorized to establish sub-agencies. He made a contract with the defendant, which was in terms an agreement by the plaintiff to sell to the defendant automobiles at a discount of ten per cent from the list prices, and by which among other matters the defendant agreed to devote his entire time between January 1 and September 30, 1906, to selling these automobiles and to have no business transactions with the manufacturer except through the plaintiff, "nor to transact any business . . . in any way, shape or manner" for the plaintiff. The cases were tried without a jury by a judge of the Superior Court,* who made findings of fact, which so far as material were that the written contract between the plaintiff and defendant continued in force without variation or waiver, and that the relation of principal and agent did not exist between them. The defendant sold twenty-three cars, the course of business being for him to procure to be signed by the customer an order directed to the plaintiff and a deposit of twenty per cent of the cost price, which was equally divided between the plaintiff and the defendant. Although the plaintiff remonstrated with the defendant about promising early deliveries and about orders being made out in this form, he accepted all the orders presented. By reason of failure to deliver automo-

* *Fessenden*, J. The cases came before this court on exceptions of the defendant.

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biles to customers at times stipulated, due chiefly to the impossibility of getting them from the manufacturer, several customers demanded and in most instances collected from the plaintiff the entire deposit.

The first action is to recover damages arising from the failure of the defendant to devote all his time to the sales business and from his endeavoring to procure an agency contract directly from the manufacturer, contrary to the contract. The judge found that the defendant had broken the contract in both these respects, and that if he had devoted his entire time "he could have sold more cars" and for this particular breach he assessed substantial damages. It has not been argued that the finding of a breach of the contract in trying to procure an agency directly from the manufacturer was not warranted, but no damages were assessed for this breach. All the evidence as to the other breach and the damages has been reported, and it is urged that these are not supported by the evidence. The findings of fact made by a trial judge stand upon the same ground as the verdict of a jury. They cannot be revised or reviewed, and can only be set aside when they are without any foundation in the evidence. *Wylie* v. *Cotter*, 170 Mass. 356. *Schendel* v. *Stevenson*, 158 Mass. 351, 354.

A careful study of this record brings us to the conclusion that there is no evidence to warrant a finding that the defendant did not devote his time according to the terms of the contract. It is urged that this may be inferred from the circumstance that before May 16 he had secured orders for twenty-three automobiles, and did not get one thereafter. But this might have arisen from many different causes. Indeed, frankness of statement as to the delays already experienced in deliveries from the manufacturer would have been very likely to prevent orders. Testimony that in April the defendant said "What cars I cannot get by the first of May I don't want at all" is also relied upon. But that was made long before it is contended that he ceased work and in connection with time of deliveries of cars. It fails to show that he did not in fact work months later. Late in August three automobiles reached Boston from the manufacturer, which were proffered by the plaintiff's agent to the defendant upon condition that he would pay for them. Some

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persons who had ordered automobiles were present, and the defendant asked if certified checks of the customers would be accepted, and was told that they would be. It does not appear whether or not the defendant took the cars nor whether his refusal, if he did refuse, was not based on the inability of the customers to pay cash or to their dissatisfaction. These are the only bits of testimony to which the plaintiff has pointed as supporting this finding. Collectively they fail to support it. The defendant was called as a witness, but it does not appear that his examination elicited anything to show a failure to perform his contract in this regard. He visited the factory of the manufacturers in Ohio after the plaintiff had left the Commonwealth for the season, but this seems to have been a necessary incident in his work. The testimony of the agents of the plaintiff constantly associated with the defendant does not disclose any lack of energy on his part. The finding of this breach of the contract so far as anything appears upon the printed record rests upon conjecture and hence cannot stand.

It becomes unnecessary to determine whether the assessment of any damages in this action was too speculative in view of the newness of the venture, its dependence upon the temperament, energy and perseverance of the defendant, the absence of any evidence as to prospective customers, the performance by the plaintiff of his contract with the manufacturer and the latter's inability or indisposition to fill orders promptly. See *Noble* v. *Hand*, 163 Mass. 289; *Todd* v. *Keene*, 167 Mass. 157.

In the second action it was ruled correctly by the Superior Court that, as the orders of the customers for automobiles secured by the defendant were directed to and accepted by the plaintiff and were signed only by the customer, the latter could enforce from the plaintiff return of the deposit money on failure to deliver as required by the orders. In substance this was a ruling that there was a contract directly between the several customers and the plaintiff. It is strongly argued by the defendant that it was wholly inconsistent with this ruling for the judge to find that the written contract between the plaintiff and the defendant was in its practical effect an agreement to purchase the same automobiles, and was in full force and effect. It is further argued that a finding that the contract continued to

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subsist in the face of acceptances by the plaintiff of orders addressed to himself signed by the customer and not by the defendant was likewise inconsistent. There is cogency in this criticism, yet it does not quite go to the extent of requiring us to set aside the finding. It was an implied condition of the contract between the plaintiff and the defendant that they should be able to procure from the manufacturers automobiles which were to come under its operation. The discount from the list price to be allowed to the defendant on sales could not become his absolutely unless and until there was a sale. If there was an advance payment made to him out of a deposit it must or might have been found to have been conditioned upon the ultimate consummation of the sale. If the sale failed through no fault of the customer so that the initial deposit had to be returned, then the defendant had no right as against the plaintiff to keep his share of this deposit. It cannot be said that there is incompatibility in law between a finding that the contract of the plaintiff with the defendant was not changed and the further finding that it applied to circumstances not within its strict letter, but within its general purview. The substance of the relation between the plaintiff and the defendant had to do with the sale of automobiles by the latter. The only way the defendant was to receive any money out of the relation was by getting ten per cent of the list price on actual sales. Although their conduct toward customers was such that the latter had a right to treat the plaintiff as the one solely responsible to them, the written agreement between the plaintiff and the defendant might still subsist to the effect that the defendant was to receive something, which they called a discount on sales. If this was so, then it would be unjust to permit the defendant to keep his share of a deposit made in contemplation of a sale when the sale was not completed, and the plaintiff was compelled by reason of conditions, which they both knew about and may have been found to contemplate, to return the whole deposit. By virtue of the relation established between the parties under their contract, it became the duty of the defendant to return to the plaintiff the part of the deposit he had retained. This is the way we interpret the findings and rulings of the Superior Court. This being so, all the requests for rulings presented by the de-

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fendant were either inapplicable or contrary to findings of fact made upon conflicting or unreported evidence, and hence not to be disturbed.

The defendant has argued that the evidence required a finding that the written contract between the plaintiff and the defendant was waived, and that of principal and agent substituted. This was an affirmative defense, the burden of proving which rested on the defendant. *Sayles* v. *Quinn*, 196 Mass. 492, 495. It can be ruled as matter of law upon evidence partly oral that an affirmative issue is made out only in rare instances, of which this is not one.

The defendant has urged also that because the plaintiff has not paid in cash the full amount of the deposit in one instance he cannot recover. There is nothing in this. His liability has been fixed, and he has arranged by deposit of collateral or pledge for its extinguishment.

The plaintiff presented certain requests for rulings which were not passed upon, and were ultimately withdrawn. The defendant has no right to complain of this. It is true that in the trial of an action at law before a judge without a jury, a party has a right, by the seasonable presentation of appropriate requests for rulings, to know the principles of law which guide the judge in reaching his conclusions. If requests for rulings are presented which are sound in law, pertinent to the issues, and applicable to the evidence, it is the duty of the judge to grant them and to follow them in reaching his decision. Failure to do so is ground for a good exception. *Jaquith* v. *Davenport*, 191 Mass. 415, 418. See *Clarke* v. *Second National Bank*, 177 Mass. 257. But the defendant does not bring himself within this rule. He did not present the requests which he seeks to argue, but relies upon some presented and subsequently withdrawn by the adverse party without judicial action. So long as the judge and the party presenting them were content with this course, no one else can complain. No error is shown in this regard.

Exceptions in the first case sustained; exceptions in the second case overruled.

W. O. Underwood, (*S. R. Wrightington* with him,) for the defendant.

H. W. Ogden, (*W. H. Rand, Jr.*, with him,) for the plaintiff.

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THOMAS C. BIGWOOD *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

ADDIE A. BIGWOOD *vs.* SAME.

THOMAS C. BIGWOOD *vs.* SAME.

CHARLES E. BUTTERFIELD *vs.* SAME.

Suffolk. March 13, 1911. — June 21, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Matter of conjecture, Street railway. *Evidence*, Circumstantial, Presumptions and burden of proof.

In an action for personal injuries alleged to have been caused by the negligence of the defendant, where the evidence is wholly circumstantial, although the plaintiff is not bound to exclude the possibility of every cause for the accident from which he suffered other than the negligence of the defendant, he must present evidence showing the greater likelihood that the negligence of the defendant was such cause, and if on the facts disclosed by the evidence it is as reasonable to suppose that the cause of the accident was one for which no liability would attach to the defendant as one for which the defendant is liable, the plaintiff has not made out a case which entitles him to go to the jury.

In an action against a street railway corporation for injuries received, when the plaintiff was a passenger on a car of the defendant, from an extraordinary explosion of dynamite, it appeared that the accident happened at about eight o'clock on an evening late in September, that when the explosion occurred the car, if moving at all, was going not more than six or eight miles an hour, that shortly before the accident there passed over the track an express wagon, on which four pine or spruce boxes filled with sticks of dynamite had been loaded with other merchandise, that each box weighed about fifty pounds, that one of these boxes had been loaded on the top of a dry goods box, that the load was not bound perfectly and that before reaching the track another rope was used for binding, but that nothing was missed from the load at that time, that the wagon proceeded on its way and crossed the defendant's track at about the place and a few minutes before the explosion occurred, and that after the explosion the driver of the wagon discovered that the box which had been on the top of the dry goods box was gone, and only three boxes of dynamite could be found, that the car was equipped with a fender, the height of which from the ground was not fixed, but there was some evidence that its height from the ground was six inches. There was no evidence as to the manner in which the accident occurred. No person who survived saw the dynamite upon the track or observed the impact of the car upon it. *Held*, that it could not be said that a cause of the accident attributable to the negligence of the defendant had been indicated by anything stronger than a pure conjecture, and accordingly that there was no evidence for the jury of the defendant's negligence.

FOUR ACTIONS OF TORT, three for personal injuries, and the other by one of these plaintiffs for consequential damages aris-

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ing from injuries to his wife, another of the plaintiffs, all of the injuries having been sustained by reason of an explosion at or near the junction of Main Street and Wyoming Avenue in the city of Melrose on the evening of September 21, 1904, which wrecked a car of the defendant in which the plaintiffs were passengers. Writs dated November 26, 1904.

In the Superior Court the cases were tried together before *Brown*, J. At the close of the evidence, which is described in the opinion, the judge ordered a verdict for the defendant in each of the cases; and the plaintiffs alleged exceptions.

A. T. Smith, (*C. W. Bartlett* with him,) for the plaintiffs.

F. P. Cabot, (*P. N. Jones* with him,) for the defendant.

RUGG, J. These are actions brought to recover damages for injuries received by passengers of the defendant. The car in which they were travelling came to a place on Main Street in Melrose on a slightly descending grade at about seven minutes before eight o'clock on the evening of September 21, 1904, when an explosion of terrific violence occurred, which completely wrecked the forward part of the car, granulated the stone pavement of the street, blew away a portion of one rail of the defendant's track and killed and injured many people. The evidence as to the operation of the car immediately before was slightly conflicting. Several witnesses testified that it came to a stop, and then started forward slowly; others said it was coming to a stop; while one thought it was going six or eight miles an hour. If moving, its speed was such that it might have been stopped quickly and in a short distance. It appears to be conceded that dynamite was the cause of the catastrophe. The evidence as to dynamite was this in substance: The city of Melrose had ordered two hundred pounds of dynamite to be delivered at its stone crusher, and on the afternoon of September 21 this had been brought from a hulk in the harbor where a quantity was stored. It was in four pine or spruce boxes, each about seventeen and one half inches long, eleven and five eighths inches wide and eight and three fourths inches deep, and containing one hundred cartridges. Each cartridge was cylindrical in form, one and one fourth inches in diameter and eight inches long, weighing one half pound, and they were packed in tiers in sawdust. Each box weighed about fifty

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pounds. The evidence is not clear as to how securely the box covers were attached, but there was perhaps some to the effect that it was by four nails. These four boxes were delivered in Boston to the driver of an express team to be transported to Melrose, who put them on his load with other merchandise where they fitted best, one being on the top of a dry goods box. The load was not perfectly bound, and at some place between Charlestown and Everett another rope was used for binding, and nothing appears to have been missed from the load at this time. He then drove on to Melrose, and, at about the place where and a few minutes before the explosion occurred, crossed the tracks of the defendant and continued on to his stable not far away. Within half an hour after the explosion he discovered that the box which had been on the top of the dry goods box was gone, and that only three boxes of dynamite could be found. There was no evidence aside from the explosion as to where this box was, or in what position or how the box or its contents was upon the street, or how or if at all the car came in contact with the dynamite. So far as disclosed on the record, no one saw it after it was bound more securely upon the top of the dry goods box between Charlestown and Everett. There was evidence that empty boxes were kept on the hulk in the harbor "as oftentimes one gets broken; the men will drop a box ten or fifteen feet and smash it and the dynamite is repacked," and that dynamite was more or less of "an erratic substance." The car was equipped with a fender, the exact height of which above the ground was not fixed, but there was some evidence that it was six inches. The plaintiffs contend upon this evidence that a jury would be justified in finding that the explosion was caused by the collision of the defendant's car with a box of dynamite on its track brought about by the negligence of the defendant or its motorman.

The calamity which injured the plaintiffs was so extraordinary as to be wholly outside the pale of experience. It is not like derailment, a misplaced switch, sudden stopping or starting, a flash of electricity or any one of those not uncommon accidents, which might be taken to speak for itself of some lack of care or want of control of instrumentalities within the custody of the carrier and used by it in conducting its business.

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It did not result from any agency actually or constructively within the possession of the defendant. It did not flow from any cause upon the property of the defendant, like escaping gas, electricity or water, but from something upon the public way, over which the defendant had no control, and for the condition of which it had no responsibility. Ordinarily no one would have the slightest reason to suspect that dynamite would be lying about the street. There is no evidence whatever that the defendant or its servants had special information of this unusual danger or could have obtained it by the exercise of that high degree of care exacted of common carriers of passengers. Under these circumstances it has not been and could not properly be argued that the happening of the explosion was itself evidence of negligence. The plaintiffs put their case frankly on the ground of the failure of the motorman to avoid striking an obstacle left through the gross carelessness of somebody who was a stranger to the defendant, and which turned out to be an explosive of high power. This is the main proposition, although there are subsidiary charges of negligence of the defendant in failing to furnish sufficient light to enable the motorman to see and escape the danger.

By bringing their actions, the plaintiffs assumed the obligation to show that the negligence of the defendant caused their injury. This was an affirmative burden and could not be left to surmise, conjecture or imagination. There must be something amounting to proof, either by direct evidence or rational inference of probabilities from established facts. While the plaintiff is not bound to exclude every other possibility of cause for his injury except that of the negligence of the defendant, he is required to show by evidence a greater likelihood that it came from an act of negligence for which the defendant is responsible than from a cause for which the defendant is not liable. If on all the evidence it is just as reasonable to suppose that the cause is one for which no liability would attach to the defendant as one for which the defendant is liable, then a plaintiff fails to make out his case.

There is no evidence here as to how the accident occurred. No human eye now living saw the dynamite upon the street or observed the impact of the car against it. It is conceivable that it

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may have occurred by the car running upon the box of dynamite while it was intact. It is equally reasonable to theorize that the box, as it worked out from under its binding on the top of the dry goods box and fell six or more feet, broke open in striking on the stone paved street, and a single stick rolled upon the rail while the rest remained outside the rail, but near enough to be exploded by the detonation of the single stick as the car rolled over it. It is also not inconceivable that as it fell a wheel of the heavy express wagon may have rolled against the box in such way as to break it open and scatter its contents. It cannot be said to have been negligence for a motorman to run upon so small an object as a single stick of dynamite in the night time. It might be suggested with like plausibility that the motorman observed the box, if it was whole and partly in front of his car, and proceeding slowly, brought his fender or the wheel of his car against it in the expectation that it would be pushed aside, the car being so fully under his control as to enable him with certainty to prevent derailment, and that the dynamite exploded by the jar and friction thus engendered. These hypotheses illustrate the wide range of rational speculation available in the vain effort to point with any greater assurance to one rather than to another as the way in which the misfortune occurred. When the mind is left in such uncertainty it cannot be said that a cause attributable to the negligence of the defendant has been indicated by a probability sufficient to be removed from the realm of fancy. We know of no case closely similar to this in its facts, but the principle upon which this decision turns has been frequently applied. *Wadsworth* v. *Boston Elevated Railway*, 182 Mass. 572. *Hunt* v. *Boston Elevated Railway*, 201 Mass. 182, 185. *Jameson* v. *Boston Elevated Railway*, 193 Mass. 560. *Faulkner* v. *Boston & Maine Railroad*, 187 Mass. 254. *Thomas* v. *Boston Elevated Railway*, 193 Mass. 438. *MacDonald* v. *Edison Electric Illuminating Co.* 208 Mass. 199. *Ormandroyd* v. *Fitchburg & Leominster Street Railway*, 193 Mass. 180. *Kupiec* v. *Warren, Brookfield & Spencer Street Railway*, 196 Mass. 463. *Bevard* v. *Lincoln Traction Co.* 74 Neb. 802.

Exceptions overruled.

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WILLIAM S. HALL, trustee, *vs.* JOSEPH B. HALL & others.

Suffolk. March 20, 1911. — June 21, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Devise and Legacy. Words, "Previous decease," "Then living," "Survivors."

The will of an unmarried woman contained the following provision: "Upon the death of both my said brothers, and the said J. [one of the brothers] leaving no issue then living, I give, devise and bequeath all the then remaining trust property and estate, with any accumulations, in three equal portions, one portion to be divided equally between my cousins, J. M. and S., children of my uncle, W.; one portion to be divided equally between my cousins, H. and G., children of my aunt, Caroline, and one portion to my uncle, the said T., to them, their heirs and assigns respectively forever. In case of the previous decease of either of my said cousins or of my uncle, T., leaving issue then living, I direct that the share of such deceased cousin, or of my said deceased uncle, be paid over in equal portions by right of representation to such issue. If there be no such issue then living such share shall be divided equally among the survivors of my said cousins and said uncle, or the whole to be paid over to the survivor of them." One of the brothers died before the testatrix, leaving no issue. The other brother enjoyed the income of the trust fund for twenty years and then died, leaving no issue. During the lifetime of this brother the testatrix's cousin H. died, leaving no issue, and about a month later the testatrix's uncle T. died, leaving issue. Upon a bill by the trustee for instructions, it was agreed that the issue of the deceased uncle took his share, and the question was whether under the last sentence of the paragraph quoted the issue of the uncle could share in the deceased cousin's share. *Held*, that in the phrase "In case of the previous decease of either of my said cousins" the word "previous" meant previous to the time of distribution at the death of the survivor of the testatrix's two brothers, and that in the later clause, "If there be no such issue then living such share shall be divided equally among the survivors of my said cousins and said uncle" the words "then living" and "survivors" referred also to the time of distribution, and that, as the uncle was not at that time a survivor, his issue must be excluded in the distribution.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 17, 1910, by the trustee under the will of Annie H. Parker, late of Boston, for instructions.

The case was heard by *Hammond*, J. The clause of the will in regard to which instructions were sought is quoted in the opinion. The two brothers of the testatrix there mentioned were J. Brooks Parker and Charles A. Parker. The testatrix died on October 1, 1890, and her will was proved on October 27, 1890.

The brother J. Brooks Parker died on March 5, 1890, during

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the lifetime of the testatrix, leaving no issue. The other brother, Charles A. Parker, having received the entire net income during his life, died on October 11, 1910. The cousin, Herbert H. Eustis, died on February 21, 1903, leaving no issue. The uncle, Thomas B. Hall, died on March 22, 1903, leaving issue, two daughters, the defendants Emily D. (Hall) Meyer and Minna B. Hall. The defendants Joseph B. Hall, Maria H. Hall, Susan B. Horton, (formerly Hall,) and George D. Eustis were the cousins named in the will. It was not disputed that the share of the uncle Thomas B. Hall in the remainder went to his two daughters, Emily D. Meyer and Minna B. Hall, and the only question in the case was in regard to the disposition of the share of the cousin, Herbert H. Eustis: Whether the share of this cousin, (who died just before his uncle Thomas B. Hall,) went in fourths to the other now surviving cousins named in the will, namely, to George D. Eustis, Joseph B. Hall, Maria H. Hall and Susan B. Horton, or in fifths, four parts going to the cousins just named and one part going, through the uncle Thomas B. Hall, to his two daughters, Emily and Minna.

The justice reported the case for determination by this court as follows: "I decided that the trustee should divide the share of Herbert D. Eustis, deceased, into five equal parts, and pay one of such parts to each of the four cousins of the testatrix, Joseph B. Hall, Maria H. Hall, Susan B. Horton, and George D. Eustis, and one such part to her cousins, Emily D. Meyer and Minna B. Hall, issue of Thomas B. Hall, uncle of the testatrix; and at the request of counsel for Joseph B. Hall, Maria H. Hall, and Susan B. Horton, I report the case for the consideration and decision of the full court."

F. Rackemann, for Joseph B. Hall, Maria H. Hall and Susan B. Horton.

J. Abbott, for Minna B. Hall and Emily D. Meyer.

RUGG, J. The testatrix, a spinster, by her will gave the residue of her estate in trust to pay the income to her brothers for life and the survivor with remainder to the issue of one of them. Both have died without issue. The clause of her will operative in this contingency is "Upon the death of both my said brothers, and the said J. Brooks leaving no issue then living, I give, devise and bequeath all the then remaining trust property and

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estate, with any accumulations, in three equal portions, one portion to be divided equally between my cousins, Joseph B., Maria H. and Susan B. Hall, children of my uncle, Wm. P. Hall; one portion to be divided equally between my cousins, Herbert H. and George Dexter Eustis, children of my Aunt, Carolina B. Eustis; and one portion to my uncle, the said Thomas B. Hall, to them, their heirs and assigns respectively forever. In case of the previous decease of either of my said cousins or of my uncle, Thomas B. Hall, leaving issue then living, I direct that the share of such deceased cousin, or of my said deceased uncle, be paid over in equal portions by right of representation to such issue. If there be no such issue then living such share shall be divided equally among the survivors of my said cousins and said uncle, or the whole to be paid over to the survivor of them."

The last surviving brother died in 1910. The cousin, Herbert H. Eustis, died in February, 1908, leaving no issue, and all the other cousins named were alive at the termination of the life estates. The uncle, Thomas B. Hall, died in March, 1903, leaving two daughters who are still living, and who were of mature years when the will was executed. The question is as to the disposition of the share, to which the cousin, Herbert H. Eustis, would have been entitled, had he lived until after the death of the brothers. The conflicting contentions are on the one side that it is to be divided into fourths among the surviving cousins named in the will, and on the other side that it is to be divided into fifths, and one fifth given to each of such cousins and the other fifth to the two daughters of the deceased uncle, Thomas B. Hall. The controversy relates wholly to the point of time when the gift over on the decease of a cousin takes effect, whether at the death of the cousin or at the termination of the life estates.

It is urged in favor of the division into fifths that upon the other contention circumstances are conceivable which might have resulted in partial intestacy (though this is a remote contingency in view of the number and age of the cousins), and that it is a general rule that the law favors the vesting of interests at the earliest moment possible. It is also said that the daughters of the deceased uncle bore the same degree of relationship to the testatrix as the other residuary beneficiaries

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aside from the uncle, and it would be natural in the absence of a contrary intention to put cousins on an equal footing. These suggestions are all entitled to weight. But as has been said repeatedly the cardinal rule for the interpretation of wills, to which all others are subsidiary, is to determine from all the language used by the testator what is the intent expressed. We proceed to examine the decisive language chosen by this testatrix.

The words "then living" applied to the issue of the brother, J. Brooks, in the first sentence of the clause quoted, must refer to the termination of the life estate, as do also the words "then remaining" in the same sentence. The words "previous decease" in the second sentence mean a decease occurring previous to the termination of the life estate. About these there can be no dispute. Thus, three times by three different phrases reference is made to a single point of time, which is the period of distribution. It is natural that the words "then living" which follow immediately touching the issue of a deceased cousin or uncle should refer to the same point of time rather than to a different one. Words of the same general significance are commonly used in the same rather than in a varying sense in the same instrument. Moreover, the words are tautological and have no force unless they refer to the period of distribution. One cannot die leaving issue unless such issue is then living. A construction which gives effect to all the language used is preferred to one which treats some as superfluous. The final sentence quoted provides for the contingency of the decease of one or more of the beneficiaries named without issue. In this event she gives the share to the survivors or the whole to the survivor. The whole of the residuum could hardly go to one survivor if the share of each as they severally deceased should vest from time to time in all the survivors. This language bears a slight indication that the words "survivors" and "survivor" refer to the period of distribution, and not to that of each decease. Then, too, there is an omission in this sentence of the provision found in the preceding one that the issue shall take by right of representation. This is a further circumstance looking to the same result. There are also no words of present gift to the survivors or survivor, which has been regarded some-

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times as indicative of an intent that the interest should not vest until the period of distribution arrives. No one of these considerations standing alone would be decisive, but combined they appear to overbalance the arguments to the contrary, and by a slight preponderance they lead to the conclusion that the point of time intended by the testatrix as that when the survivors or survivor should be ascertained was the period of distribution.

A decree should be entered directing the trustee to divide the share which would have fallen to Herbert H. Eustis equally between Joseph B. Hall, Maria H. Hall, Susan B. Horton and George D. Eustis.

So ordered.

MALDEN AND MELROSE GAS LIGHT COMPANY *vs.* FRANK E. CHANDLER.

SAME *vs.* SAME.

Middlesex. March 21, 1911. — June 21, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Equity Pleading and Practice, Exceptions.

Upon exceptions to the rulings of a judge who heard a suit in equity only questions of law are open, and the refusal of the judge to make findings of fact requested and his general finding of a fact upon conflicting evidence cannot be reviewed.

In a suit in equity by a corporation against its former president, involving the issue whether in a certain transaction the defendant was acting fraudulently or honestly toward the plaintiff, a request of the defendant for a ruling, that the burden of proof is on the plaintiff to satisfy the judge by a fair preponderance of the evidence of the existence of a particular fact which the plaintiff has averred in its bill and has relied upon to show fraud, properly may be refused by the judge if the request omits all reference to the fundamental allegation of the defendant's liability for defrauding the plaintiff, which the judge is satisfied is established whether the details of the fact stated in the request are proved or not.

TWO BILLS IN EQUITY, filed in the Superior Court on December 3, 1906, and January 21, 1907, by a corporation against its former president, for an accounting as to money alleged to belong to the plaintiff and to have been received by the defendant as the plaintiff's agent and to have been retained by him for his

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own use and benefit, the defendant having procured the money from the plaintiff for the purchase of certain land for the plaintiff.

In the Superior Court the cases were tried together before *Dana*, J. The subject of controversy and the character of evidence are described in the opinion.

In the first suit the defendant asked the judge to make the following findings of fact:

"1. On all the evidence the agreed price at which the land was sold to the plaintiff was $2,000 an acre.

"2. On all the evidence the defendant paid to J. E. Wellington the sum of $58,000 and odd together with interest."

In the second suit the defendant asked the judge to make the following finding of fact:

"1. On all the evidence the defendant paid Hill for the Hill land so called the sum of $3,000 and paid to J. E. Wellington the sum of $3,000 substantially in accordance with the intendment of his understanding with said J. E. Wellington."

In the first suit the defendant asked the judge to make the following rulings:

"1. The burden of proof is upon the plaintiff to satisfy the court by a fair preponderance of the testimony: (1) That the price at which the land was finally sold by Wellington to the plaintiff was $1,000 per acre; (2) that the defendant took $29,000 and odd from the plaintiff under the claim fraudulently made by him that the agreed price was $2,000 per acre and fraudulently converted said sum to his own use.

"2. If the court shall find that the price for the land purchased was honestly made by the defendant and Wellington at $2,000 per acre, then it makes no difference under this bill whether Wellington actually received $58,000 and odd or not."

In the second suit the defendant asked the judge to make the following rulings:

"1. The burden of proof is upon the plaintiff to satisfy the court by a fair preponderance of the testimony that the defendant claiming fraudulently to the plaintiff in substance that the price of the Hill land was $6,000 paid $3,000 to the Hills and fraudulently converted $3,000 to his own use.

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"2. If the court shall find that the defendant agreed with J. E. Wellington that he should have the difference between the amount for which said Wellington said the Hill land could be bought, namely, $500 per acre or $1,000 in all, and an amount of $4,000 that equalled two acres at $2,000 per acre, and the defendant believed J. E. Wellington assisted in bringing about a sale of the Hill land and therefore paid J. E. Wellington said sum of $3,000, then this bill must be dismissed."

The judge refused to make any of the above findings of fact in either case.

As to the requests for rulings, the judge said:

"I construe request No. 1, in each case, as meaning that, if the facts therein set forth are not found legally proved by the court, there can be no recovery. On such an assumption, although I found a conversion, I deny said request in each case."

As to the other requests for rulings the judge refused each of them as inapplicable to the facts as found by him.

The court found for the plaintiff in both cases, with costs; and the defendant alleged exceptions.

T. W. Proctor, (*S. R. Wrightington* with him,) for the defendant.

W. O. Underwood, for the plaintiff.

BRALEY, J. The plaintiff desired to enlarge its works, and the board of directors voted that the defendant, who was the president of the company, be appointed with the vice-president as a committee "with authority . . . to purchase . . . such additional land for the enlargement of the company's business as in their judgment may be advisable." The defendant, acting under the vote, appears to have conducted the negotiations which resulted in the purchase and a transfer of title to the plaintiff of the parcels of land described in the bills of complaint. It is settled, that, in the exercise of the authority conferred upon him, the defendant could not enrich himself at the expense of his principal by charging and receiving a larger price than that for which he actually bought the property. Having been appointed to act in the plaintiff's interest, he was bound to buy on the best possible terms, and he could not directly or indirectly make a profit for himself. If as alleged, he bought for much

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less than the price he represented to the plaintiff, he would be accountable for the money which the company paid him in ignorance of the deception. *Greenfield Savings Bank* v. *Simons*, 133 Mass. 415. *Quinn* v. *Burton*, 195 Mass. 277, 279. *Kilbourn* v. *Sunderland*, 130 U. S. 505.

The evidence at the trial as to the terms of sale was contradictory. If the defendant's testimony was accepted, the payments received by him did not exceed the price for which each estate had been purchased, while the evidence of the plaintiff tended to support its contention, that it had been deliberately defrauded. The credibility of the witnesses was for the presiding judge to determine, and it must be assumed that the evidence, which is fully recited, justified the finding that the money had been converted. But the cases being before us on exceptions, the refusal of the judge to make certain findings of fact requested by the defendant and the general finding of conversion cannot be reviewed, as only questions of law are open. *Kennedy* v. *Welch*, 196 Mass. 592. The findings upon which the judge decided that there had been a conversion and the facts upon which he refused the defendant's second request were not stated. It only appears that certain facts were found which rendered these requests inapplicable. The findings manifestly must have been adverse, and, if the defendant desired further information as to what they were, he should have applied for and obtained them. If he deemed the conclusions to have been wholly unwarranted, he fails to show that he has been aggrieved, for we do not understand him to contend, nor did he ask for a ruling, that upon all the evidence, independently of the pleadings, the judge could not find that the defendant acted dishonestly and accordingly have ordered a decree for the plaintiff. *National Mahaiwe Bank* v. *Barry*, 125 Mass. 20.

But, as to the first requests, the judge, on the assumption that unless he found the facts to be as therein set forth the plaintiff could not recover, refused to give them. The defendant in support of his exceptions relies on the familiar rule of equity pleading that the bill should contain a clear and accurate statement of the facts upon which the plaintiff rests its case for relief, and that it can introduce evidence only which tends to support the averments. It is then pressed that the facts re-

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cited in the requests are the essential allegations which the plaintiff was required to prove, and that unless the judge found that they had been proved a decree for the plaintiff could not be supported. It undoubtedly would have been enough to have alleged generally that the defendant as the agent of the plaintiff bought for a certain price the lands in question, and, having obtained unlawfully from the plaintiff a larger amount, he was chargeable with the overpayment, and it would be unnecessary to state minutely all the circumstances, which properly are matters of evidence. *Rogers* v. *Ward*, 8 Allen, 387. *Lovell* v. *Farrington*, 50 Maine, 239. *Grove* v. *Rentch*, 26 Md. 367, 377. R. L. c. 159, § 12. And, if the action had been at law, a count for money had and received would have been sufficient. *Cole* v. *Bates*, 186 Mass. 584, 586. *Foote* v. *Cotting*, 195 Mass. 55, 63. The stating part of the bills set forth with much particularity the details of the transaction, but, even if there may have been unnecessary amplification, the material facts on which the plaintiff relied for relief are stated with certainty, and if proved they were sufficient to support the decree. The allegation recurs throughout the stating part, that the defendant bought for a specific price. It is then charged, as the foundation of the right of recovery, that, when the plan to defraud had been perfected, the wrong was finally consummated by obtaining from the plaintiff by false representations amounts very largely in excess of the amount the defendant actually had contracted to pay. The essential averment following the details of the scheme was that the money had been obtained wrongfully, and the finding of a conversion must have rested on this ground. If the plaintiff was confined to this averment, and, where there is a variance, recovery can be had only on the case stated in the bill and not upon the case made out by the evidence, the judge was not restricted to the actual price paid to the vendors. *Gurney* v. *Ford*, 2 Allen, 576. *Drew* v. *Beard*, 107 Mass. 64, 73. *Harding* v. *Handy*, 11 Wheat. 103. *Crocket* v. *Lee*, 7 Wheat. 522, 525. It might have fallen below or exceeded the amount stated and in either instance there would not have been a variance if he found that the plaintiff had been defrauded and then determined the amount that the defendant wrongfully received.

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The ruling refusing the requests should not be interpreted as meaning that if the evidence justified recovery the plaintiff could prevail even if the proof did not correspond with the averments. It was refused, and properly refused, because it omitted all reference to the fundamental allegation of liability which the judge was satisfied had been established.

We find no error in the admission and exclusion of evidence. *Jennings* v. *Rooney*, 183 Mass. 577, 580. *Liddle* v. *Old Lowell National Bank*, 158 Mass. 15. *Graham* v. *Middleby*, 185 Mass. 349, 353. *Webb Granite & Construction Co.* v. *Boston & Maine Railroad*, 206 Mass. 572, 578.

Exceptions overruled.

HENRY WENZ *vs.* JEROME J. PASTENE.

Suffolk. March 28, 1911. — June 21, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Landlord and Tenant. Equity Jurisdiction, To establish rights under unrecorded lease for more than seven years. *Deed,* Registration.

Under R. L. c. 127, § 4, if a person enters into a contract to purchase certain land and makes a part payment under the contract, without knowledge that the land is leased by an unrecorded lease for more than seven years, and then such intending purchaser is informed of the existence of the lease, he is deprived by such notice of the power to become an innocent purchaser, and if he chooses to complete the contract by paying the balance of the purchase money and taking a deed of the land, he holds it subject to the lease, which the lessee by a suit in equity may establish against him.

In a suit in equity by the lessee of certain real estate under an unrecorded lease for a term of more than seven years, against the purchaser of the real estate at a foreclosure sale, to enjoin the defendant from ejecting the plaintiff and to establish the lease, it appeared that the defendant as the highest bidder at the sale entered into a contract to purchase the property and made a part payment of $2,000, and that at the time he entered into such contract and made such payment he had not actual notice of the existence of the lease, but that before the delivery of the deed to him and his payment of the balance of the purchase money, $40,000, he had actual notice of the lease, and that he paid such balance and took his deed, although the terms of the sale provided that, if he discovered and gave notice to the mortgagee of a material defect in the title, the mortgagee should perfect the title or return the part payment. The defendant contended that, if the plaintiff's lease was established against him, such establishment should be made conditional upon the payment of $2,000 by the plaintiff to the defendant to reimburse him for the part payment made by him

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before he had knowledge of the lease. In a decision establishing the plaintiff's lease and enjoining his ejectment, it was *held*, that under the circumstances the decree should contain no condition of a prepayment of $2,000 by the plaintiff.

BILL IN EQUITY, filed in the Superior Court on October 14, 1910, to enjoin the defendant from ejecting the plaintiff from the premises occupied by him at 40 Ferdinand Street in Boston under a lease made to the plaintiff by one Gunaris on April 15, 1903, for a term of ten years and one month ending on May 14, 1913, and to establish the lease, which was alleged to have been unrecorded and to have been destroyed partially by fire. The bill alleged that on May 20, 1904, Gunaris made a mortgage of the premises containing a power of sale in case of default, that on August 24, 1910, the premises were sold under the power of sale and were purchased by the defendant, and that before the sale the defendant had notice of the lease to the plaintiff.

In the Superior Court the case was heard by *Hardy*, J. He found that the lease and the mortgage were made and that the defendant purchased at the foreclosure sale all as alleged in the bill. He also found that the lease was not recorded and that after its execution it was mutilated by fire so that it could not be recorded. He found that the mortgagees had actual notice of the lease before the execution of the mortgage; that the defendant was the agent of one Howe in connection with the purchase and the conveyance to him of the premises; that the defendant did not have actual notice of the existence of the lease before the auction sale; but that before the delivery of the deed to the defendant and the payment of the balance of the purchase money, the principal of the defendant, Howe, as well as the defendant, had actual notice of the existence of the lease to the plaintiff, or knowledge of such facts in connection with the lease as the judge found to be equivalent to actual notice. He also found that the plaintiff was ready to pay the $2,000, which was paid by the defendant or his principal at the time of the auction sale as a part of the purchase money, and that he further was willing to pay the whole amount that was paid by the defendant for the deed of the premises, $41,600, as well as all the rent that had accrued for the use of the premises under the terms of the lease.

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The judge found that the plaintiff was entitled to relief under the prayers of the bill, with costs, upon the condition that he paid to the defendant the $2,000 which was a part payment of the purchase money at the auction sale, with interest thereon from the date of such payment, as well as all rent that had accrued to date.

The judge ordered to be entered the following final decree:

"1. That the lease, a copy of which is annexed to the plaintiff's bill, is established as a subsisting valid lease, of which the defendant had actual notice before the delivery of the deed of the premises therein described, to, and the acceptance thereof by, the defendant, and of which lease the mortgagees named in the bill had actual notice when they took the mortgage mentioned in said bill.

"2. That the defendant, Jerome J. Pastene, his agents, attorneys and servants, are hereby enjoined and restrained from ejecting or disturbing the plaintiff in his possession of the premises described in said lease, so long as the covenants in said lease by the tenants to be performed, are performed and kept, and defendant is further enjoined and restrained from conveying said premises or any interest therein, excepting to a person or persons to whom the defendant has first given actual notice of said lease.

"This injunction shall, however, be of no force and effect, unless the plaintiff pays or tenders to the defendant the sum of $2,000 and interest thereon at six per cent per annum, from August 24, 1910, and also all unpaid rent accrued and due at the time of such tender or payment."

The plaintiff appealed from so much of the decree as directed that the injunction be of no force and effect, unless the plaintiff paid or tendered to the defendant the sum of $2,000 and interest thereon at six per cent per annum from August 24, 1910, and also all unpaid rent accrued and due at the time of such tender and payment.

The defendant appealed from the decree generally.

H. Albers, (*J. B. Holt* with him,) for the plaintiff.

C. F. Choate, Jr., for the defendant.

BRALEY, J. The term of the plaintiff's leasehold was for more than seven years, and the lease, not having been recorded,

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was valid only as against the lessor or his heirs and devisees, and persons having actual notice of it. R. L. c. 127, § 4. If the history of the statute is examined, the provision that actual notice must be shown, or a subsequent purchaser is not affected by an unrecorded instrument, first appears in the Rev. Sts. c. 59, § 28. But under the provisions of St. 1783, c. 37, § 4, providing that, although effective against the grantee and his heirs, a prior deed unless recorded, should not defeat a subsequent conveyance, the second purchaser could not hold the land, if he had express notice of the prior title before the purchase was consummated by delivery of the deed. *Adams* v. *Cuddy*, 13 Pick. 460. To permit him to do so, said Chief Justice Parsons in *Farnsworth* v. *Childs*, 4 Mass. 637, 639, "would be to convert the statute into an engine of fraud, instead of a protection against it." The additional words, "and persons having actual notice thereof" incorporated in the Rev. Sts. c. 59, § 28, did not change the law, but merely put in statutory form what already had been declared by judicial exposition. *Lawrence* v. *Stratton*, 6 Cush. 163, 166. *Morse* v. *Curtis*, 140 Mass. 112, 113.

The lessor mortgaged the reversion, and, although the mortgage omits any reference to it, the judge found, that the mortgagees at the date of the execution of the mortgage, and the defendant before delivery of the deed at the foreclosure sale, under which he asserts a paramount title to the premises, had actual notice of the existence of the plaintiff's lease. But being the highest bidder, and having entered into a contract to take the property, and having made a partial payment of the purchase price before he was notified, the defendant contends, that he acquired an inchoate right, which was perfected by the delivery and acceptance of the deed under the power of sale. If following the sale, and before receiving notice, the remainder of the price had been paid and the deed delivered, the defendant would have been a purchaser in good faith for a valuable consideration, but where notice is received before the purchase price has been actually paid, the completion of the purchase is held by the great weight of authority to be a fraud upon the prior holder of the title under an unrecorded deed or other instrument. *Osborn* v. *Carr*, 12 Conn. 195, 201. *Grimstone* v. *Carter*, 3 Paige, 421, 437. *Peabody* v. *Fen-*

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ton, 3 Barb. Ch. 451, 464. *Nantz* v. *McPherson*, 7 T. B. Mon. 597. *Goldsborough* v. *Turner*, 67 N. C. 403. *Weaver* v. *Barden*, 49 N. Y. 286, 292. *Sargent* v. *Eureka Spund Apparatus Co.* 46 Hun, 19. *Haughwout* v. *Murphy*, 7 C. E. Green, 531. *Dean* v. *Anderson*, 7 Stew. 496. *Patten* v. *Moore*, 32 N. H. 382. *Blanchard* v. *Tyler*, 12 Mich. 339. *Dugan* v. *Vattier*, 3 Blackf. 245. *Wells* v. *Morrow*, 38 Ala. 125. *Hoover* v. *Donally*, 3 Hen. & M. 316. *Webb* v. *Bailey*, 41 W. Va. 463. *Everts* v. *Agnes*, 4 Wis. 343, 356. *Boone* v. *Chiles*, 9 Pet. 187. *Wormley* v. *Wormley*, 8 Wheat. 421. *Townsend* v. *Little*, 109 U. S. 504, 511, 512. *LeNeve* v. *LeNeve*, 3 Atk. 646, 654. *Willoughby* v. *Willoughby*, 1 T. R. 763, 767. See Pom. Eq. Jur. (3d ed.) § 755, and cases cited in note 2. It is the setting up of the second conveyance, and not the bargain to buy, which operates to defeat the plaintiff's tenancy, and under the statute, it is actual notice before the purchaser acquires title, which deprives him of its protection. *White* v. *Foster*, 102 Mass. 375. *Lamb* v. *Pierce*, 113 Mass. 72, 74. *Adams* v. *Cuddy*, 13 Pick. 460. *Flynt* v. *Arnold*, 2 Met. 619, 623. *Sibley* v. *Leffingwell*, 8 Allen, 584, 586, 587. If by the contract of sale, and the advancement of part of the consideration, the defendant may have acquired an equitable interest, it had not been clothed with the legal title, and after notice he ceased to be an innocent purchaser, and could not destroy the plaintiff's prior estate by getting a conveyance in fee. *Sibley* v. *Leffingwell*, 8 Allen, 584, 586, 587. *Lancaster National Bank* v. *Taylor*, 100 Mass. 18. *Suffolk Savings Bank* v. *Boston*, 149 Mass. 364, 367. *Grimstone* v. *Carter*, 3 Paige, 421. *Goshen National Bank* v. *Bingham*, 118 N. Y. 349. *Vattier* v. *Hinde*, 7 Pet. 252. *Phillips* v. *Phillips*, 4 DeG., F. & J. 208.

But as he who asks equity should do equity, the defendant urges that he should be reimbursed or protected to the extent of the partial payment before relief is decreed. Illustrations where the principle invoked would be applicable readily occur. If, for instance, the purchaser before notice, and by agreement with the vendor, discharged a mortgage or lien on the property in part payment, generally he should be allowed the amount disbursed, as the enhanced value of the estate enures to the benefit of the holder of the prior title. We do not find in the present case analogous conditions. The property to be sold was the mortgagor's title

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as it stood at the date of the mortgage, and included the whole estate, and not merely the equity of redemption. *Ewer* v. *Hobbs*, 5 Met. 1, 3. *Hall* v. *Bliss*, 118 Mass. 554, 559. *Skilton* v. *Roberts*, 129 Mass. 306. *Callaghan* v. *O'Brien*, 136 Mass. 378, 383. The defendant, even if he acted as the agent of an undisclosed principal, is the record owner of the fee, and the bill is not brought to compel him to surrender the property. By the terms of sale it was expressly provided, that if the defendant discovered a material defect he could give written notice of it to the mortgagees, who if they preferred, might perfect the title, but if they did not they were obligated to return the payment. A title which appeared to the defendant to be perfect when the property was struck off had become defective, and he could have rescinded the contract, and maintained an action to recover back the instalment he had paid if the vendors refused to return it. *Callaghan* v. *O'Brien*, 136 Mass. 378, 383. *Burk* v. *Schreiber*, 183 Mass. 35, 36. Or if he had declined to complete the purchase, they could not have compelled specific performance. *Jeffries* v. *Jeffries*, 117 Mass. 184, 187. The plaintiff is not found to have been negligent in the assertion of his claim, and the right to rescind, which offered an ample opportunity to avoid being obliged to take an incumbered title, could be exercised only by the defendant. It may be, that as the lease would expire in something less than three years, while the rent reserved would be payable to the owner of the reversion, the value of the property with the accruing rent, would be a fair equivalent for the entire purchase price. But whatever may have been the reason, the defendant with knowledge of the incumbrance, by which, of course, his principal was bound, apparently did not desire either to receive back the money, or to obtain a clear title, and affirmed the contract. If for his principal's benefit, whom he is not shown to have consulted, or in the exercise of his own judgment as to the proper course to be taken, the defendant voluntarily went forward, and obtained the conveyance, he does not present a superior equity which entitles him to priority. *Grimstone* v. *Carter*, 3 Paige, 421, 437. *Balfour* v. *Hopkins*, 93 Fed. Rep. 564, 570.

We are of opinion, that not only is the defendant's title subordinate to the unexpired term, but under the circumstances the

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plaintiff should not be required to refund the payment as a condition precedent to relief.

The decree must be modified by the omission of this requirement, but in all other respects it is affirmed.

Ordered accordingly.

NATHAN G. NICKERSON, JR., & another *vs.* INHABITANTS OF HYDE PARK.

Norfolk. March 24, 1911. — June 21, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Tax, Sale: disclaimer by collector, resale.

Under the provision of R. L. c. 13, § 72, that if the collector of a town or city has reasonable cause to believe that a tax title held by the town or city "is invalid by reason of any error, omission or informality in the assessment, sale or taking, he may disclaim and release such title by an instrument under his hand and seal, duly recorded in the registry of deeds," a defect, consisting of an incorrect recital in the collector's deed to the town or city, is a defect in the sale, of which the deed was the culminating act, and constitutes an invalidity in the sale which gives the collector a right to disclaim the title under the statute.

Where the collector of a town or city has disclaimed a tax title of such town or city under R. L. c. 13, § 72, because he had reasonable ground to believe that such title was invalid by reason of an error, omission or informality in the assessment, sale or taking, he has power, where the two years during which the lien continues have not expired, to advertise the property again for sale and to sell and convey it with correct formalities, giving a good tax title.

MORTON, J. This is a petition to register the title to land in the defendant town. The defendant claims title, subject to redemption, by virtue of a tax deed dated August 12, 1909, and recorded August 20, 1909, from the collector to it pursuant to a sale on August 11, 1909, for the tax of 1907. A previous deed to the town dated September 12, 1908, had been declared invalid by the Land Court for the reason that it recited that the property was sold for the non-payment of taxes assessed in 1908 instead of 1907, and also because it failed to state, what was the fact, that no bid was made at the sale. Thereupon the collector, believing that the incorrect recital in the deed of 1908 constituted a defect in the sale and authorized a disclaimer, and

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acting under the advice of counsel for the town, executed and caused to be recorded pursuant to R. L. c. 18, § 72, an instrument disclaiming and releasing the title of the town under the deed of 1908, and proceeded to advertise the property again for sale, and sold and conveyed it to the town by deed dated and recorded as aforesaid.

The case was sent to a master * who ruled that "the tax title created by said sale and deed [of 1909] is a valid tax title and that if this petitioner is entitled to register his title it should be subject to said tax title." The petitioner filed exceptions to the report which were sustained in the Land Court † and a decree was ordered for the petitioner free from the lien claimed by the respondent under its deed of 1909. The case comes here on exceptions by the respondent to the refusal of the Land Court to confirm the master's report, and to give certain rulings requested by the respondent.

The validity of all matters up to and including the commitment of the warrant and tax list to the collector was admitted by the petitioners. After the sale in 1908 the collector entered in his cash book under the collections for September, 1908, "Nickerson and Baker, sold to Hyde Park Sept. 9, interest $26.37, tax $620.50. Total paid $646.87." It is conceded that there was no alienation of the land between the assessment in 1907 and the sale in August, 1909.

The petitioners contend that the deed of 1908 did not constitute a part of the sale, and that, therefore, there was no invalidity in that sale and the collector had no authority to file a disclaimer and to sell again in 1909. If that is not so then they contend that the statute gives the collector no power to sell again after a disclaimer where the tax title is held by a city or town.

The deed was the culminating act, the finishing touch so to speak, in the sale without which it would have been incomplete. In common acceptation a sale includes the passing of the title. The defect in the deed of 1908 constituted, therefore, we think an invalidity in the sale and the collector could disclaim pursu-

* Roger D. Swaim, Esquire.

† By *Davis*, J.

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ant to R. L. c. 13, § 72. The result of the petitioners' contention would be that there would be no remedy provided by statute where the invalidity in the tax title was caused by a defect in the deed. We think that the Legislature intended to afford a remedy whether the failure in the title arises from errors in the assessment, or in the subsequent proceedings, and that the statute can be and should be so construed.

We also think that the sale and deed of 1909 were valid. The two years during which the lien continues had not expired. The entry upon the collector's book was, as the master rightly ruled, a mere bookkeeping entry. The tax has not been paid, and unless the sale and deed of 1909 are valid the town will lose the tax which it is admitted was rightly assessed. The petitioners contend that although the last clause of R. L. c. 13, § 72, provides that the collector may disclaim and release a tax title held by a city or town which he has reasonable cause to believe is invalid by reason of any error, omission or informality in the assessment, sale or taking, there is no provision for a sale in case of such release or disclaimer, and that the provisions for reassessment and collection in §§ 70, 71, and 72, apply to cases where the title is held by a third party and not by a city or town. But we think that that is too narrow a construction. The sections are to be construed together. The object of the legislation is to enable cities and towns to avoid liability or loss in regard to defective tax titles and to insure the assessment and collection of the taxes for which such titles stand. The original statute was entitled, "An Act in relation to the collection of taxes." St. 1878, c. 266. The collector, if he has reasonable cause to believe that the title is invalid, may, according to §§ 70 and 71 where the title is held by a third party, give him notice and take such steps as will procure a release or result in an extinguishment of the title. Where the title is held by a city or town, the collector, according to § 72, may disclaim or release by an instrument under his hand and seal and duly recorded in the registry of deeds. There is nothing to indicate that the effect so far as the reassessment and collection are concerned is to be any different in a case where the title is held by a city or town from what it is where the title is held by a third party, and no good reason can be given why it should be. That this was the under-

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standing of the commissioners in consolidating and arranging the Public Statutes is entirely plain. What is now three sections in the Revised Laws was divided by them into four, numbered 70, 71, 72 and 73. The first two, 70 and 71, were substantially the same as the sections with the same numbers in the Revised Laws. Section 72 was the same as the concluding clause in § 72 of the Revised Laws, that is the clause that gives to the collector the right of disclaimer where the title is in the city or town, and § 73 was the same as the first two clauses in § 72 of the Revised Laws, that is the clauses that deal with the matters of reassessment and collection. As arranged by the commissioners it is clear the provisions as to reassessment and collection applied to cases where the title was in a city or town as well as to cases where it was in a third party. The order adopted by the commissioners was more logical and clearer, but we do not think that the inversion which took place in the final enactment was intended by the Legislature to signify or does signify a substantive change in the report of the commissioners. There is nothing in *Charland* v. *Home for Aged Women*, 204 Mass. 563, which helps the petitioners.

Exceptions sustained.

J. A. Keefe, for the respondent, submitted a brief.

C. J. Stone, for the petitioners.

CARLETON HUNNEMAN & another *vs.* LOWELL INSTITUTION FOR SAVINGS & another.

Suffolk. March 28, 1911. — June 21, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Practice, Civil, Amendment, Officer's return. *Execution. Attachment.*

When by a final order of court an officer has been allowed to amend his return upon an execution and makes such amendment in accordance with the order, a copy of the amended return filed in the registry of deeds has the same effect as if the amendment had been incorporated in the original return.

Under R. L. c. 178, § 4, the requirement that an officer who has taken land on execution shall deposit a copy of the execution in the registry of deeds ap-

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plies only to an execution levied on land which was not attached on mesne process.

Where an execution is levied upon land which already was attached in the same action on mesne process, the plaintiff's rights under the attachment are not affected by other attachments that intervene while the levy of the execution is proceeding and before it is completed as far as the nature of the case permits.

BRALEY, J. The facts concerning this litigation are fully set forth in the former appeal and need not be recited, nor the grounds of decision which established the right of the surety company in the name of the plaintiff, who was the judgment creditor, to reach and apply the money in the possession of the bank in satisfaction of the judgment, reviewed. *Hunneman* v. *Lowell Institution for Savings*, 205 Mass. 441.

It there appeared from the officer's return, that the execution was levied as of the date of the seizure, and not as of the date when the equity of redemption, which had been turned into money by foreclosure of the mortgage, leaving a surplus in the possession of the bank after its debts and the expenses of sale were satisfied, had been attached on mesne process. But as the right to maintain the bill was based upon the theory, that the lien of the attachment had been transferred to the money, and as other superior equitable or legal rights had intervened, unless the right of the plaintiff was established as of the date of the attachment, it was held that the bill could not be maintained. The decree, therefore, was reversed, and at the second trial, the officer having so amended his return as to show that he actually levied as of the date of the attachment, a decree was entered for the plaintiff for the amount of the judgment with interest and costs.

The judgment debtor has appealed from this decree, upon the ground, that the attachment lapsed, as the levy was not made within thirty days from the date of the judgment, and that, even if there was a valid levy, the attachment also was lost because the officer did not suspend the levy by reason of prior attachments, but proceeded while the interest to be sold still was subject to them. The amendment, however, having been duly allowed by the court, the copy filed in the registry of deeds had the same effect as if incorporated in the original return. *Childs* v. *Barrows*, 9 Met. 413, 416. *Bates* v. *Willard*, 10 Met. 62, 81. *Hunneman* v. *Phelps*, 207 Mass. 439. A further answer is, that

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a copy of the execution with the return need not be filed when the property has been attached in the action. R. L. c. 178, § 4.

The second objection also is not well founded. It is to be remembered, that a sale on execution never took place as the foreclosure transformed the land into money, and the proceedings by the officer were necessary only to secure the priority of the plaintiff's lien. The fact that the levy proceeded and was completed as far as possible, while the intervening attachments were pending, cannot impair or defeat its effect in preserving the plaintiff's rights under the attachment. *Owen* v. *Neveau*, 128 Mass. 427, 431. *Cowles* v. *Dickinson*, 140 Mass. 373, 376. *Hunneman* v. *Lowell Institution for Savings*, 205 Mass. 441, 445. R. L. c. 178, § 31.

Decree affirmed.

A. L. Richards, for the defendant Phelps.

W. B. Luther, for the plaintiffs.

JOSEPH J. WALL, assignee, *vs.* JOHN F. KELLY.

Suffolk. March 30, 1911. — June 21, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Bond, To dissolve attachment.

Where a sum of money, which by agreement of the parties to an action has been placed in the hands of an attaching officer in substitution for an attachment of real estate, has been attached by supplementary process under R. L. c. 167, § 80, this last attachment may be dissolved by a bond, in which the condition is to pay unconditionally any final or special judgment in the action and of which the penal sum is not double the amount of the damages demanded in the writ, if the creditor voluntarily consents to accept the bond as security for the debt in place of his attachment. Such consent need not be express, but may be found from the fact that the counsel for the attaching creditor, who inspected the bond and examined the sureties before a master in chancery, made no objection to the form of the instrument, especially when this is confirmed by the additional fact that the attaching creditor in his answer in another proceeding relating to the same deposit of money admitted that the attachment had been dissolved by the bond and that the debtor had become entitled to recover the deposit.

CONTRACT OR TORT by the surety on a bond given to dissolve an attachment, as the assignee of the principal, against a deputy

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sheriff for $800, with two counts, one alleging the conversion of that sum of money by the defendant, and the other, alleged to be for the same cause of action, for money had and received to the plaintiff's use. Writ in the Municipal Court of the City of Boston dated December 1, 1908.

On appeal to the Superior Court the case was tried before *Hardy*, J. The facts which appeared by the evidence are stated in the opinion. At the close of the evidence the plaintiff, at the suggestion of the judge, elected to rely on the count for money had and received. The defendant asked the judge to order a verdict for the defendant, which the judge refused to do. The judge in his charge to the jury instructed them that as matter of law the second bond given by the plaintiff's assignor, which is mentioned in the opinion, was valid and dissolved the attachment made by the defendant under the special precept, which also is mentioned in the opinion.

The jury returned a verdict for the plaintiff in the sum of $901.60, including interest on $800 from November 23, 1908. The defendant alleged exceptions to the refusal of the judge to order a verdict for him, and to the instructions stated above.

F. P. Garland, (*A. Berenson* with him,) for the defendant.

E. W. Philbrick, for the plaintiff.

BRALEY, J. The real estate of the plaintiff's assignor having been attached by the defendant as a deputy sheriff, the debtor desired to release the attachment, and offered in substitution a sum of money somewhat in excess of the debt demanded. By agreement of the parties supplementary process issued under R. L. c. 167, § 80, and, the amount agreed upon having been deposited with the defendant, he attached it, and the plaintiff's counsel then released the attachment on the real estate. The debtor subsequently sought to dissolve the attachment on the money, and gave a bond on which the present plaintiff became surety, and made an assignment of the deposit to him as security. It is, however, unnecessary to consider the effect of this bond, for, the defendant having refused to surrender the money, a second bond was given on which the plaintiff relies as having worked a dissolution of the attachment.

By R. L. c. 167, § 121, the condition of the bond should be to pay to the plaintiff, within thirty days after the recovery of a spe-

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cial or final judgment, the value of the property released, which should be described in the bond. If this requirement had been complied with, the attachment would have been dissolved by force of the statute without the creditor's consent, as the sureties were duly approved by a master in chancery, and the bond had been filed with the clerk of the court from which the writ issued. R. L. c. 167, §§ 119, 121. *O'Hare* v. *Downing*, 130 Mass. 16.

But, as the condition inserted was to pay unconditionally the amount of any final or special judgment, and the penal sum was not double the amount of the damages demanded in the writ, the defendant contends that the bond was invalid. The creditor, however, voluntarily could consent upon tender of the bond to accept it as security for his debt, and dissolve the attachment which covered only the money in the hands of the officer. If he consented, the bond, having been delivered to the officer and retained, was enforceable at common law, and the money should have been surrendered to the debtor or to the plaintiff as his assignee. *Mosher* v. *Murphy*, 121 Mass. 276. *Smith* v. *Meegan*, 122 Mass. 6. *Central Mills* v. *Stewart*, 133 Mass. 461. *Farr* v. *Rouillard*, 172 Mass. 303. See *Berry* v. *Wasserman*, 179 Mass. 537, 540. It is unnecessary that his consent should be shown by proof of an express acquiescence and acceptance. It may be implied from either the declarations and conduct of himself or his counsel, who had authority to release the attachment. *Marble* v. *Jamesville Manuf. Co.* 163 Mass. 171. The first bond with a similar condition had been objected to and refused solely because the penal sum was less than the amount named in the special process, and the second bond was given to correct the error. It was exhibited to the counsel for the creditor, who examined the sureties before the master, and made no objections to the terms of the instrument. The jury on the evidence could find, that he knew the purpose for which both bonds were offered, and the condition of the obligation, but did not care to object to the form of the second bond, which rectified the error, if the sureties were found by the master to be sufficient. The answer of the creditor to the bill of interpleader, brought by the defendant after the bond was given to have the court determine to whom the money belonged, which was introduced in evidence is confirmatory proof that this was the understanding. It is there

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expressly admitted, that the attachment had been dissolved "by virtue of said bonds," and that the debtor had become entitled to recover the deposit. It is to be assumed, as the exceptions do not state to the contrary, that appropriate instructions were given, and, if the jury took this view of the testimony, they were warranted in finding that the bond had been accepted. See *Marr* v. *Washburn & Moen Manuf. Co.* 167 Mass. 35. A verdict for the defendant, therefore, could not have been ordered, and the instructions, that the bond dissolved the attachment, were correct.

Exceptions overruled.

STATE STREET TRUST COMPANY *vs.* TREASURER AND RECEIVER GENERAL.

SAME *vs.* EDWARD FRIEBE & another.

Suffolk. May 15, 1911. — June 21, 1911.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Tax, On legacies and successions. *Inheritance Tax.*

A transfer of property by a trust deed may have been "made or intended to take effect in possession or enjoyment after the death of the grantor" and thus be subject to a succession tax under St. 1909, c. 490, Part IV. § 1, although the grantor reserved no power of revocation, unless the property passed to the beneficiary with all the attributes of ownership independently of the death of the grantor.

In order to bring a transfer by a trust deed, which is made or intended to take effect in possession or enjoyment after the death of the grantor, within the exception contained in St. 1909, c. 490, Part IV. § 1, of "cases of a *bona fide* purchase for full consideration in money or money's worth," so as to exempt the transfer from the payment of a succession tax, it is not enough that there should have been a valuable consideration, but the consideration also must have been adequate, and, if it consisted of services rendered to the grantor, their value may be inquired into, in a suit in equity by the trustee for instructions as to whether the tax should be paid, for the purpose of ascertaining whether the services rendered fulfil the requirement of the statute by equalling or exceeding in "money's worth" the value of the property transferred.

A widow advanced in years and in feeble health desired to secure during her life the services and companionship of a certain man, fifty-four years of age, who was employed as a travelling salesman at a salary of $2,200 a year in addition to his travelling expenses. In consideration of his resigning this position and removing with his wife to the widow's residence, where they continued to live and to care for her until her death, the widow deposited with a trustee $100,000, face value, of three and one half per cent bonds of the Com-

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monwealth of Massachusetts, with a declaration of trust directing the trustee to pay the income during her life in equal shares to the man and his wife, and upon her death to transfer the bonds to them in equal shares absolutely if they both survived her, or, in case at the time of the settlor's death either of the beneficiaries should be dead, to transfer the whole of the bonds to the survivor, or, in case the settlor should survive both the beneficiaries, then at her death to transfer one half of the bonds as one of the beneficiaries should have appointed by his will and the other half as the other beneficiary should have appointed by her will, or in default of appointment by either of them, to his or her next of kin. At the time of the settlor's death, the bonds had an actual market value of not less than $90,000. Upon a bill in equity by the trustee for instructions, it was *held*, that the transfer of the bonds under the deed of trust did not constitute "a *bona fide* purchase for full consideration in money or money's worth" within the exception contained in St. 1909, c. 490, Part IV. § 1, and consequently that the transfer was subject to a succession tax under that statute.

TWO BILLS IN EQUITY for instructions, filed in the Probate Court for the county of Suffolk on July 21, 1910, by the State Street Trust Company, a corporation, which had received on January 19, 1910, $100,000, in face value, of registered bonds of the Commonwealth of Massachusetts from Annie Preston Lincoln of Boston, indorsed in blank by her, to be held by the plaintiff in trust under an instrument in writing of that date, the instructions sought being as to whether it was the duty of the plaintiff to pay any tax to the treasurer and receiver general of the Commonwealth under St. 1907, c. 563, codified in St. 1909, c. 490, Part IV.

The instrument creating the trust was as follows:

"Know all men by these presents

"That Whereas I, Annie Preston Lincoln of Boston, in the County of Suffolk, and Commonwealth of Massachusetts, have this day transferred to the State Street Trust Company of said Boston, one hundred thousand dollars, ($100,000.00) face value of the three and one-half per cent (3 1/2%) bonds of the Commonwealth of Massachusetts, as Trustee.

"And Whereas Edward Friebe of Cohasset, Massachusetts, has this day agreed with me that he will resign from his position as an employee of the S. S. Pierce Company within ninety (90) days from the date hereof, and has this day paid to me one dollar and other valuable considerations.

"Now Therefore, I direct my Trustee to hold the said bonds on the following trusts, to wit: To pay the income thereof dur-

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ing my life to the said Edward Friebe and his wife Abby Frances Friebe, in equal shares semi-annually or oftener as it may seem fit; and on my death I direct my trustee to transfer said bonds to said Edward Friebe and his said wife in equal shares absolutely, and in case at the time of my death one of said Edward Friebe and his said wife should be dead, to transfer the whole of said bonds to the survivor; and in case I should survive both the said Edward Friebe and his said wife, then at my death to transfer one-half of said bonds as said Edward Friebe may have appointed by will, and in default of said appointment, to his next of kin living at my death, by right of representation, and one-half of said bonds as said Abby Frances Friebe may have appointed by will, and in default of said appointment to her next of kin living at my death, by right of representation. If such bonds should reach maturity before my death, I direct my Trustee to reinvest and hold the proceeds on the same trusts as hereinbefore specified in regard to said bonds.

"In Witness Whereof I have hereunto set my hand and seal this 19th day of January, 1910.

"Annie Preston Lincoln."

Annie Preston Lincoln died on May 6, 1910. It was alleged in the bills and admitted in the answers that at the time of the death of Annie Preston Lincoln the bonds "had an actual market value of not less than $90,000." Edward Friebe and Abby Frances Friebe, who were the beneficiaries of the trust, denied that any inheritance tax was due to the Commonwealth upon the bonds.

On January 31, 1911, *Grant*, J., made a decree, which concluded as follows: "It appearing that the deed or grant of the property in question by Annie Preston Lincoln was a deed or grant to take effect in possession and enjoyment after the death of the said Annie Preston Lincoln, but that said deed or grant was a *bona fide* purchase for full consideration in money or money's worth, it is ordered and decreed that said bonds are not subject to any tax under the provisions of law relative to the taxation of legacies and successions."

The treasurer and receiver general appealed from so much of the decree as ordered that the bonds were not subject to any tax, and Edward Friebe and Abby Frances Friebe appealed from so

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much of it as ruled that the deed or grant was one to take effect in possession and enjoyment after the death of Annie Preston Lincoln.

In the Supreme Judicial Court, an agreed statement of facts was submitted in substance as follows:

The instrument dated January 19, 1910, printed above, was recorded in the Suffolk registry of probate. The following was indorsed upon it: "Boston, January 19, 1910. In consideration of the aforesaid Declaration of Trust, I, Edward Friebe, hereby agree to resign from my business position as an employee of the S. S. Pierce Company within ninety days from this date. Edward Friebe."

In the early part of October, 1909, the defendants Edward Friebe and Abby Frances Friebe, at the request of Mrs. Annie Preston Lincoln, established their home with her in her house, numbered 338 on Commonwealth Avenue in Boston. Mrs. Lincoln for more than ten years had been in feeble health, and was then absolutely confined to the house. Friebe was employed as a travelling salesman for the S. S. Pierce Company and more than four fifths of his time was occupied in journeys which kept him away from home at night. Mrs. Lincoln frequently expressed a desire to Friebe that he should give up his travelling employment, so that she could rely at all times on having him staying in the house in case of any emergency for which she might need him. Friebe told Mrs. Lincoln that he was not in a position to retire, and "he states that it was in order to enable him to give up his position and remain at home that Mrs. Lincoln offered to make the transfer of bonds which was completed by the deed of trust of January 19, 1910."

In accordance with his agreement, about January 25, 1910, Friebe offered his resignation orally to W. L. Pierce, president of the S. S. Pierce Company, to take effect on April 1, 1910, seventy-two days after the date of the deed of trust, and thereby completing exactly twenty-one years of service with the company. On March 31, 1910, Friebe received his last pay from the S. S. Pierce Company in the form of a check for $166.66, and thereupon his connection with the firm ceased. He was then fifty-four years of age and in good health. As to the permanence of Friebe's employment, Wallace L. Pierce, president

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of the S. S. Pierce Company, made the following statement: "Mr. Edward Friebe was in our employ for upwards of twenty years. During all that time his services were entirely satisfactory. We have no reason to think that he would not have remained with us indefinitely, if he had not resigned his position of his own accord. In fact we were very sorry to have him leave."

For about eight years previously and up to the time of his retirement, Friebe received a salary of $2,200 a year, and, in addition to his salary, was reimbursed for his travelling expenses, which, for the year ending March 31, 1909, amounted to the sum of $2,276.86, and for the year ending March 31, 1910, amounted to the sum of $2,213.63, making the total sum received from the S. S. Pierce Company in 1909, $4,476.86, and in 1910, $4,413.63. It was agreed that Friebe would testify that his position was worth to him, substantially, $3,500 per annum.

From the time that his resignation went into effect Friebe resided continuously at No. 338 Commonwealth Avenue with Mrs. Lincoln until the date of her death, at the age of seventy-three, on May 6, 1910.

It was agreed that the "American Experience Tables" might be referred to as if incorporated in the agreed statement of facts. Upon these tables the value of a life interest in $100 in a person fifty-four years of age was $46.51.

Neither Edward Friebe nor Abby Frances Friebe was related to Mrs. Lincoln. Mrs. Friebe was a cousin of the late husband of Mrs. Lincoln.

The appeals came on to be heard by *Loring*, J., who ordered that the two cases be heard together and reserved them for determination by the full court upon the bills, answers, decrees, claims of appeal, objections to the decrees and the agreed statement of facts, such order to be entered as law and justice might require.

The cases were submitted on briefs.

J. M. Swift, Attorney General, *& F. T. Field*, Assistant Attorney General, for the Treasurer and Receiver General.

J. G. Forbes, F. J. Stimson & L. M. Stockton, for Edward Friebe and Abby Frances Friebe.

BRALEY, J. The question presented by these cross appeals

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is, whether the bonds held in trust by the plaintiff are subject to a succession tax under St. 1907, c. 563, § 1, now by codification St. 1909, c. 490, Part IV. § 1. The tax imposed is not upon the property itself, although its value is made the basis of taxation, but on the right of transmission, where under the deed, grant or gift the property is not to vest in possession or enjoyment until after the death of the grantor, donor or settlor, or, if not expressed, such intention is found. *Emmons* v. *Shaw*, 171 Mass. 410, 413. St. 1909, c. 490, Part IV. § 1.

It is the first contention of the defendants in the second appeal, who are the beneficiaries under the trust, that they are exempt, as the transfer of the property in question became complete in the lifetime of the donor or settlor. By the terms of the instrument creating the trust no power of revocation is reserved. The test, however, by which the exemption is to be ascertained does not depend upon whether a power to revoke has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferror. It is the absence of the power of control with the unrestricted right of the recipient to dispose of the property and to receive and use the proceeds, which by the express language of the statute subjects it to the tax. *Crocker* v. *Shaw*, 174 Mass. 266, 268. *New England Trust Co.* v. *Abbott*, 205 Mass. 279, 282. *Matter of Brandreth*, 169 N. Y. 437, 442. *Vanderbilt* v. *Eidman*, 196 U. S. 480, 493. The defendants were to receive the income of the bonds in equal shares, and neither they nor their respective donees, if the power of appointment was exercised, nor their respective next of kin, if it was not exercised, were to receive the principal until the death of the settlor. If the income was payable to them, the intention of the settlor is plain, that the principal, even if it vested in title, was not to vest in possession and enjoyment during her life, and the defendants have failed to bring themselves within this exception. *Crocker* v. *Shaw*, 174 Mass. 266. *New England Trust Co.* v. *Abbott*, 205 Mass. 279.

The declaration of trust makes no reference to any consideration, and on its face the transfer was a gift. But from the agreed facts it appears that the settlement was made because the settlor, Annie Preston Lincoln, who was advanced in years

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and in feeble health, desired to secure during her life the services and companionship of the defendant, Edward Friebe. In performance of the contract he resigned a lucrative position to enter her service, and removed with his wife, Abby F. Friebe, to her residence where they continued to reside and care for her until her death. It is because of the consideration thus furnished, that they also rely upon the further provision, that where the transfer is "a *bona fide* purchase for full consideration in money or money's worth," a tax shall not be levied. To have the benefit of the exemption they must bring themselves within its terms. St. 1909, c. 490, Part IV. § 1. *Brooks* v. *West Springfield*, 193 Mass. 190, 192. The policy of the law is, that the owner of property shall not defeat or evade the tax by any form of conveyance or transfer, where after death the income, profit or enjoyment enures to the benefit of those who are not exempted. *Minot* v. *Winthrop*, 162 Mass. 113. *Emmons* v. *Shaw*, 171 Mass. 410, 412. The intention to evade may be apparent in the instrument of transfer, or it may be found when all the circumstances attending the transaction are disclosed, yet from whichever source the proof may be derived, when the evasion is established the transfer is not "*bona fide*" as required by the statute. The transfer or conveyance, however, would not be invalidated, or the tax defeated, as the fund or property would be liable to taxation in the possession of the grantee, donee, or transferee. *Tritt* v. *Crotzer*, 13 Penn. St. 451.

The statute also requires that the consideration must be for the full value of the property whether paid in money, or the acceptance by the transferror of property or services, or some benefit of an equivalent pecuniary measurement, and the defendants strongly urge that the principle which obtains between vendor and purchaser, or where prior equities between purchasers of the same estate, or the rights of creditors are to be ascertained, should be applied. To sustain a right to specific performance of an unexecuted contract, or the rights of an innocent purchaser for value and without notice, it is not necessary that the consideration should be adequate, although it must be valuable. *Somes* v. *Brewer*, 2 Pick. 184. *Lee* v. *Kirby*, 104 Mass. 420, 428. *Wood* v. *Chapin*, 13 N. Y. 509. *Borell* v. *Dann*, 2 Hare, 440, 450. *Basset* v. *Norsworthy*, 2 White & Tudor's

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Lead. Cas. in Eq. (4th Am. ed.) 1. But under the construction contended for, only conveyances or transfers founded on a good or meritorious, as distinguished from a valuable consideration would be included. See 2 Kent Com. (14th ed.) 464, 465, and *Floyer* v. *Bankes*, 3 DeG., J. & S. 306. It also places within the power of the parties the right to agree upon a price in money, or on some right, interest or benefit accruing to one party or the other as a basis of transference, which, while recognized as being valuable, might be wholly inadequate when compared with the fair market value of the property. It furthermore would substitute their judgment, although honestly exercised, for the approval of the tax commissioner, who by § 20 alone is empowered to determine the valuation.

The legislative purpose has been expressed in plain, unambiguous words, and a construction should not be adopted by reading into the statute a qualification which deprives them of their ordinary and natural import. It is within the power of the Legislature to enlarge the exemption, but until this is done, the statute is not complied with unless the consideration, whatever form it may assume, is not only valuable, but full, by covering the value in money, or the equivalent in money of the property transferred. *United States* v. *Hart*, 4 Fed. Rep. 292. *United States* v. *Banks*, 17 Fed. Rep. 322, 323. If services rendered or to be rendered constitute the consideration as in the present case, their value may be inquired into and ascertained, and where in "money's worth" they equal or exceed the fair value of the property at the death of the transferror, no tax can be imposed. If they fall below such value, there is no provision for a reduction, leaving the excess only to be taxed as a gratuity.

The services to be rendered by Edward Friebe, when viewed from the situation in which he and Mrs. Lincoln were placed, even if estimated on the basis of his salary and earnings received in the position he left and then capitalized on his expectation of life, exclusive of the contingency, that if he had continued in his former employment he might have been discharged or have become incapacitated, are insufficient in amount to equal one half of the cash value at her death of the bonds as stated in the petition and admitted by the defendants.

We are therefore of opinion, that, while the appeal of the ben-

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eficiaries cannot be sustained, so much of the decree of the Probate Court as held that the bonds were not subject to taxation must be reversed under the first appeal, but in all other respects it is affirmed.

Decree accordingly.

IN RE METROPOLITAN PARK COMMISSIONERS, petitioners.

Suffolk. May 15, 1911. — June 21, 1911.

Present: MORTON, LORING, BRALEY, SHELDON, & RUGG, JJ.

Metropolitan Parks District. Commissioners to apportion Expenses of Metropolitan Parks District. Constitutional Law. Charles River Basin. Craigie Bridge. Statute, Construction. *Bridge.*

The commissioners to apportion the expenses of the metropolitan parks district, appointed under St. 1899, c. 419, as amended by St. 1903, c. 465, § 9, and St. 1906, c. 402, § 2, in regard to the apportionment of the expenses of the Charles River basin, formed by a dam substantially on the site of Craigie Bridge, and of the removal of Craigie Bridge and the construction of a suitable bridge in place thereof, like other similar commissioners, are clothed with a wide judicial discretion as to the considerations which should guide them in making the apportionment, and, although their report must be passed upon by the court, the court to which it is submitted will be slow to disturb an award, except in the event of its appearing to be extravagant and unreasonable or based on an unsound interpretation of the statutes or an erroneous view of the law, and, so far as the commissioners proceed within their powers, act reasonably and violate no constitutional right, their determination will not be disturbed.

The limits of the constitutional power of the Legislature to apportion the expense of a public improvement among the cities and towns benefited thereby have never been determined, but it can be said that, if the principles applied in the assessment of the municipalities would be constitutional as applied to individuals, there can be no just ground for complaint.

The commissioners to apportion the expenses of the metropolitan parks district, appointed under St. 1899, c. 419, as amended by St. 1903, c. 465, § 9, and St. 1906, c. 402, § 2, in regard to the expenses of the Charles River basin, formed by a dam substantially on the site of Craigie Bridge, and of the removal of Craigie Bridge and the construction of a suitable bridge in place thereof, are not required by the terms of the last named statute to apportion the expenses of the Charles River basin in the same manner that is adopted in apportioning the general metropolitan parks expenses.

The commissioners to apportion the expenses of the metropolitan parks district, appointed under St. 1899, c. 419, as amended by St. 1903, c. 465, § 9, and St. 1906, c. 402, § 2, in regard to the apportionment of the expenses of the Charles River basin, formed by a dam substantially on the site of Craigie Bridge, and of the removal of Craigie Bridge and the construction of a suitable bridge in

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place thereof, properly may include as a part of "the cost of the removal of Craigie Bridge and the construction of a suitable bridge in place thereof" the expense of a temporary bridge used by the public during the period of construction, it being a fair implication from the tenor of the statute that the expense of this temporary structure should be borne in the same way as the expense for the permanent accommodation of the travelling public.

RUGG, J. This is an appeal by the city of Boston and by the city of Cambridge from a decree * accepting the award of commissioners appointed to determine the apportionment among the cities and towns constituting the Metropolitan Parks District of the annual payments required to reimburse the Commonwealth for the cost and maintenance of the metropolitan parks and the Charles River basin. In substance, the ground of objection by the city of Boston is that the commissioners have not proceeded according to the terms of the statutes in apportioning the annual contributions toward the cost and toward the maintenance of the Charles River basin, while the city of Cambridge objects upon the additional ground that they have wrongfully apportioned the expense of a temporary bridge. These objections depend upon certain statutes, which it becomes necessary to examine in detail.

The commissioners were required by St. 1899, c. 419, §§ 1, 2, to "in such manner as they deem just and equitable, determine and make award of the proportions in which each of the cities and towns of said district shall annually pay money into the treasury of the Commonwealth . . . to provide the amount . . . estimated . . . to meet the interest and sinking fund requirements of the appropriations and loans authorized" for the general metropolitan park system, (St. 1893, c. 407,) for the construction of roadways and boulevards (St. 1894, c. 288) for the Revere beach reservation (St. 1895, c. 305) and for the Nantasket beach reservation (St. 1899, c. 464, § 4) "and the amount required to meet the expenses . . . of said board of metropolitan park commissioners, and of the care, maintenance and operation . . . of the parks, reservations, boulevards and other works acquired, cared for or controlled by said board. . . ." St. 1903, c. 465, created the Charles River basin commission and charged it with the duty of constructing a dam near the mouth of the

* By *Hammond*, J.

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Charles River and other extensive public improvements. Upon completion, this public improvement was to be placed under the control and management of the metropolitan park commission. Section 9 of this act, as amended by St. 1906, c. 402, § 2, imposed upon the commissioners, whose report is here in question, duties as to the expenses incurred by the Charles River basin commission and the maintenance of the Charles River basin in this language: "The commissioners . . . in apportioning the expenses of maintaining the metropolitan park system shall include as part thereof the expense of maintenance" of the Charles River basin, "shall also determine as they shall deem just and equitable what portion of the total amount expended for construction" of the Charles River basin "shall be apportioned to the cities of Boston and Cambridge as the cost of the removal of Craigie Bridge and the construction of a suitable bridge in place thereof, and the remainder shall be considered and treated as part of the cost of construction of the metropolitan park system; and shall also determine as they shall deem just and equitable, what portion of the total amount expended for the cost of construction of the marginal conduit on the south side of the basin and of the embankment and park, provided for by this act, shall be apportioned to the city of Boston as the cost of the construction of said embankment and park, and what portion shall be fixed as the cost of said marginal conduit. The cost of the construction of said embankment and park, as so apportioned, shall be repaid to the Commonwealth by the city of Boston. . . ."

The commissioners made five different tables of apportionment. They apportioned, first, the cost and maintenance of the metropolitan parks exclusive of the Nantasket Beach reservation and the Charles River basin, according to percentages made up of a combination of valuation and population and a partial exclusion of certain towns located upon the fringe of the district; second, the expense and maintenance of boulevards according to percentages based upon a combination of valuation and length of boulevard in the several municipalities; third, the Nantasket Beach reservation expense and maintenance upon all the cities and towns, including Cohasset, by a percentage based upon valuation; fourth, the expense of the construction of the Charles River basin (after deducting the cost of Craigie Bridge

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and the embankment and park as required by the statute) by assessing fifty per cent of the cost of dredging and other improvements in Broad and Lechmere canals upon the city of Cambridge on the ground that they found that that particular part of the Charles River basin work resulted in special and peculiar benefit to the city of Cambridge, by assessing sixteen and two thirds per cent of the amount expended for the Boston marginal conduit upon the city of Boston and the same percentage of the expense of the Cambridge marginal conduit upon the city of Cambridge on the ground that they found that the construction of these two conduits had conferred a special advantage upon the city in which each was located, and by assessing the balance, after these deductions, upon the cities and towns of the metropolitan parks district in proportion to valuation; fifth, the expense of maintaining the Charles river basin in accordance with the same principles after making the necessary deductions. The first three of these determinations are not attacked, but the broad objection is made to the findings touching the Charles River basin that, having made the deductions for the Craigie Bridge and the embankment and park required by the statute, the commissioners had no authority to apportion the balance either of expense of construction or of maintenance in any other way than that in which the general expenses of the metropolitan park system were apportioned. This contention is based upon the language of the statute above quoted, that the remainder "shall be considered and treated as part of the cost of construction of the metropolitan park system."

The governing principles by which actions and reports of commissioners like these are to be treated have been elaborated several times, and it is not necessary to go over the ground again. *Kingman, petitioner*, 153 Mass. 566; *S. C.* 156 Mass. 361. *Kingman, petitioner*, 170 Mass. 112. *Adams, petitioner*, 165 Mass. 497. *De las Casas, petitioner*, 178 Mass. 213; *S. C.* 180 Mass. 471. Summarily stated, they are that the commissioners are clothed with a wide discretion as to the considerations which should guide them in making the apportionment. It is to be made in such a manner as they may deem just and equitable. Their reasonable determination and not that of the court is to prevail. It is conceivable that cases might arise

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where such a gross miscalculation or mistake as to facts or law might have been made as would require the rejection of the award. The discretion of the commissioners is not arbitrary or dictatorial, but judicial. The court is required to pass upon the report, and hence the general grounds of their judgment must be submitted as a part of their report, but the court would be slow to disturb an award except in the event of its appearing "extravagant and unreasonable," or based upon an unsound interpretation of the statutes, or an erroneous view of the law. So long as they proceed within their powers, and act reasonably and violate no constitutional guaranty, their determination will not be disturbed.

The basis of the decision of these commissioners is set out at length in their report. They have endeavored to proceed according to the principles which would govern the assessment of betterments for a public improvement upon individuals within the limitations of the constitution. They have undertaken to ascertain the extent of the special benefits which have accrued to the cities adjacent to the Charles River basin and to make apportionment of expense in proportion to this special benefit before proceeding to make the general assessment. This principle is equitable and rational, and nothing appears upon the face of the report to indicate that the commissioners have failed to accomplish in this regard what they set out to do. It has not been and could not be contended successfully that this method of dividing the expense of a public improvement among cities and towns was unconstitutional. The limits of the constitutional power of the Legislature to place such burdens upon municipalities has never been determined. It is not necessary to fix them in this opinion. If the same principles are applied to such subdivisions of government as could be constitutionally applied to individuals, there is no just ground for complaint. This is plainly implied by what is said in 180 Mass. at 475.

The particular ground of attack however, is that the terms of the statute do not permit the commissioners to proceed in the way in which they have proceeded, and that they have no authority to apportion the balance of the Charles River basin expenses according to any other percentage than that employed for the entire district. The language of the statute relied upon,

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when considered in connection with the other statutes governing the metropolitan parks, does not require so narrow a construction. The statutes under which the several departments of the metropolitan park system have grown up have some tendency to indicate a natural classification of its financial burdens. The parks as a whole constitute one division, although the authority by which they have been acquired is to be found in successive enactments. The expense of the Nantasket Beach reservation is imposed by the act of the Legislature upon a territorial unit differing by the addition of one town from the metropolitan parks district as constituted for other purposes. The construction and maintenance of boulevards has been found by this and preceding commissioners to stand upon a different footing as to equitable apportionment of expense, from the general park system. A special apportionment of the boulevard expense based in fact upon benefits conferred upon particular cities and towns was upheld in 180 Mass. 471. The Legislature itself has treated the Charles River basin as a somewhat distinct entity, having reposed the responsibility for its acquirement and construction in an independent commission and required it to be turned over as a finished public improvement to the care of the metropolitan park commission. The Cambridge and Boston marginal conduits and the Broad and Lechmere canals seem to distinguish it by the peculiar character of the work upon them from the general characteristics inherent in park systems. These considerations point to the conclusion that the Legislature did not intend to limit the power of the commissioners in determining how the expense of the Charles River basin should be borne to the same principle of apportionment followed as to the general metropolitan park expenses. In *De las Casas, petitioner*, 180 Mass. 471, the court approved a classification of towns upon which varying percentages of expense of the general metropolitan parks were placed. The principle in the present case is not different in its essence. Instead of classifying the municipalities of which the district is made up, the general park system is divided into the several classifications of Charles River basin, boulevards, Nantasket Beach, and the general metropolitan parks, and the burden of these several classes is apportioned in different percentages among the several municipalities ac-

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cording to a principle which the commissioners assert to be found upon the evidence before them to be in part in proportion to benefits, and to be just and equitable. There is nothing to show, and it is not contended, that this is an extravagant or unreasonable apportionment. No objection in law appears to it as not in conformity with the statute.

The city of Cambridge objects further to the confirmation of the report on the ground that the commissioners have improperly included as a part of "the cost of the removal of the Craigie Bridge and the construction of a suitable bridge in place thereof" the expense of a temporary bridge used during the period of construction. The main principle followed by the Legislature respecting the expenses incurred as a part of this public undertaking is that so far as they relate to the accommodation of public travel between Cambridge and Boston they should be borne by these two cities. It is a part of the necessities of public travel that temporary provision for it be made during the work of construction. It is a fair implication, from the tenor of the statute, that the expense of this temporary provision should be borne in the same way as the expense for the permanent accommodation of the travelling public. Such expense bears a more intimate connection with that branch of the work required by the statute than with the general metropolitan park system. The argument drawn from the fact that special authority for the construction of the temporary bridge was incorporated in §§ 1, 8, of c. 467, St. 1898, is of slight consequence. Such authority probably would be inferred from the general scope of the work. Very many statutes where presumably temporary provision for travellers was required have made no mention of it. See for example Sts. 1900, c. 456; 1901, c. 491; 1896, c. 483; 1903, c. 441; 1903, c. 391. No error of law appears in the award of the commissioners in this regard.

Decree affirmed.

The case was submitted on briefs.

J. M. Swift, Attorney General, & *A. Marshall*, Assistant Attorney General, for the petitioners.

G. A. Flynn, for the city of Boston.

J. F. Aylward, for the city of Cambridge.

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JAMES F. BROWN *vs.* MARY E. BROWN, executrix, & another.

Suffolk. May 15, 1911. — June 21, 1911.

Present: MORTON, HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Equity Pleading and Practice, Appeal, Parties, Discretionary powers of master, Master's report. *Equity Jurisdiction*, To set aside conveyance for unsoundness of mind and undue influence. *Executor and Administrator*. *Evidence*, Of mental condition, Presumptions and burden of proof, Opinion: experts. *Joint Tenants and Tenants in Common*.

A defendant in a suit in equity has no ground for appeal from a decree which grants no relief against him and allows him his costs.

A son of a deceased father can maintain a suit in equity against a sister and a brother of the plaintiff, the three being all the children and all the heirs at law of the deceased and the defendant sister being the executrix of the father's will, to set aside conveyances of real estate which were made by the deceased to his daughter when he was insane and which were neither ratified nor avoided by the father during his lifetime, the executrix of the will having no power to ratify such a deed to the prejudice of the heirs of the testator.

In a suit in equity, by a brother against his sister, to set aside a conveyance of real estate alleged to have been made to the defendant by the father of the plaintiff and the defendant when he was insane and under the undue influence of the defendant, where it appears that the father had died, that his will, of which the defendant is executrix, was allowed and that the deed sought to be set aside was made seven years before the date of the will, and a master has found that the deceased was of unsound mind when he executed the deed, that after executing it he at times appeared to be rational but that his disease continued, that he was at no time free from it after giving the deed and that the influence of his daughter over him also continued, the fact of the allowance of the will is not conclusive of the issue in the case, but merely shows that the testator when he executed it was of sufficiently sound mind to make a will.

Where a suit in equity, to set aside a conveyance of real estate made to the defendant by a person deceased on the ground of the grantor's unsoundness of mind and of the undue influence of the defendant upon the grantor when the deed was made, is referred to a master, it is the province of the master to fix the limit of the time relating to which evidence of the grantor's mental condition will be received by him. In the present case it was held that the master could not be said to have gone too far in the exercise of his discretion in admitting evidence of the grantor's mental condition covering a period of eight years after the making of the deed sought to be set aside.

On an exception in a suit in equity to the admission by the master to whom the case was referred of a hypothetical question to an expert, if all the facts assumed in the question were found by the master to have been proved and there was no error of law, the exception will be overruled, although the question was needlessly long and complicated.

The rule, that the occupation of land by one tenant in common is not adverse to his

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co-tenants and creates no liability to them, does not apply where one co-tenant wrongfully has ousted the others and has compelled them to resort to the courts to establish their rights.

Where one tenant in common of land wrongfully has ousted his co-tenants, his liability to them to account for his occupation is the same whether he occupied the property in person or received rent for it from others.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 17, 1904, alleging that the plaintiff and the two defendants were the children and the only heirs at law of James Brown, who died on September 27, 1901, leaving a will, dated May 7, 1900, which was proved and allowed by the Probate Court of Suffolk County on December 26, 1901; that the defendant Mary Elizabeth Brown was appointed executrix and that her official bond as executrix was approved and filed on or about December 26, 1901, due publication of her appointment being made thereafter; that James Brown in his lifetime had executed deeds, conveying real estate to the defendant Mary Elizabeth Brown, as follows: on December 31, 1890, a deed by which he conveyed certain real estate on West Newton Street in Boston, therein specifically described; on March 20, 1893, a deed by which he conveyed certain real estate situated on Webber Street in Boston, therein specifically described; on March 20, 1893, a deed by which he conveyed certain real estate situated on Dudley Street, formerly Eustis Street, in Boston, therein specifically described; on March 20, 1893, a deed by which he conveyed certain real estate situated on Eustis Street in Boston therein specifically described; that at the time of the filing of the bill all the deeds were recorded in the Suffolk registry of deeds; that the plaintiff was informed and believed that at the time of the execution of these deeds James Brown conveyed and transferred to Mary Elizabeth Brown all the property owned or possessed or controlled by him with the exception of one sixty-fourth interest in certain vessels, the income from which was not sufficient for his support; that the plaintiff was informed and believed that at the time of the execution of these deeds James Brown was incapable of executing any instrument, being aged, sick and infirm, and that his mental powers were so weakened and impaired by age and sickness that he was wholly incapable of transacting the business or executing and delivering a deed of his property; that the defendant Mary

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Elizabeth Brown, while knowing his mental incapacity, took advantage to coerce him and unduly influenced him to make such conveyances, and that all the deeds were given without consideration; that the plaintiff was informed and believed that previous to the failure of his mental powers James Brown was of prudent disposition and carefully protected all his interests in this real estate, but that at and after the time of executing the deeds he was incapable of exercising rational volition, and that by these conveyances he was deprived of all means of support, with the exception of his interest in said vessels; that his mental incapacity continued down to the date of his death; that the plaintiff was informed and believed that both the defendants resided on the real estate on Dudley Street mentioned above, that the defendant Mary Elizabeth Brown constantly from March 20, 1893, had made those premises her home, and that the defendant William F. Brown during the greater part of the period had occupied the premises with his sister; that both the defendants had enjoyed and used the income from all the property conveyed as above set forth, and at the time of the filing of the will still were enjoying and using such income, but that the plaintiff had never received any part of such income, nor enjoyed the use or occupation of any of the property; that the defendant Mary Elizabeth Brown, although often requested by the plaintiff, had refused the use or occupation of such premises or the income thereof to the plaintiff; that the plaintiff had no knowledge of the execution of the deeds set forth above until after the death of James Brown, when the defendant Mary Elizabeth Brown first informed the plaintiff of the transfers of said property; that thereupon the plaintiff demanded his third interest in all of said property as heir at law of James Brown, and that the defendant Mary Elizabeth Brown promised and agreed with the plaintiff that she would release to him one third part of all said property upon the expiration of two years after the giving of her bond as executrix of the estate of James Brown, during which time she claimed the right to use said property, or the income thereof, for the payment of the debts of James Brown; that thereupon the plaintiff consented to wait until the expiration of the period of two years before demanding his interest; that upon the expiration of said period, and up to the bringing of the bill, the plain-

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tiff had many times requested Mary Elizabeth Brown to release to him by proper deeds one third interest in all of the property, but that the defendant Mary Elizabeth Brown had refused to make such transfer and conveyance.

After averments in regard to the estimated net income from the property, the bill prayed, first, that a preliminary injunction might be issued, restraining the defendant Mary Elizabeth Brown from collecting any of the rents or profits of any of the properties set forth and described in the bill, and also from transferring, mortgaging, conveying, or in any way disposing of the aforesaid properties; second, that a proper person might be appointed receiver to take charge of and manage all the property described in the bill; third, for an adjudication that James Brown, when he made and executed the aforesaid deeds, was incapable of exercising a rational volition and was coerced and unduly influenced by the defendant Mary Elizabeth Brown and that the above described deeds were null and void and should be delivered up and cancelled, and also that the decree of the court adjudging the deeds to be null and void might be placed on record in the registry of deeds for the county of Suffolk; and fourth, that the defendant Mary Elizabeth Brown might be ordered to execute her release and quitclaim deed of the above described property, to the end that the cloud should be removed from said titles, and for further relief.

The case was referred to Winfield S. Slocum, Esquire, as master. He filed a report in which he found, first, that James Brown was not of unsound mind when he executed the first deed, dated December 31, 1890; second, that he was of unsound mind when he executed the three deeds, dated March 20, 1893; third, that after executing these deeds James Brown at times appeared rational, talked about the deeds, showed knowledge of what he had done, and stated why he conveyed the property to his daughter; that his disease, however, continued and that he was at no time free from it after the giving of the deeds; that the influence of his daughter described in the report also continued. The report further stated: "I do not find that he [James Brown] ratified said deeds. . . . I find that the plaintiff has not been guilty of laches."

Both of the defendants and also the plaintiff filed objections

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and exceptions to the master's report. The case was heard by *Rugg*, J., upon the exceptions to the master's report and certain motions of the defendants, which are stated in the memorandum of decision. That memorandum, omitting the cases cited, was as follows:

"1. I deny the motion of the defendants to dismiss the suit, which is based on the ground that such suit can be maintained only by the executor or administrator. All the heirs at law and the executrix are parties to this suit, the executrix being one of the defendants and having in this respect an interest personal to herself, which is inconsistent with impartial action in her representative capacity. No objection appears to have been [made] on the ground of parties until after the report of the master was filed.

"2. The defendants' motion to discharge the master's report, because he received evidence of the mental condition of the deceased covering a period of eight years after the event under inquiry, is denied. While this was a long time, and, so far as the court can determine, a wiser discretion would have been exercised in confining the evidence within narrower limits, nevertheless it cannot be said to be so plainly wrong as to warrant a recommittal, nor does it appear that the defendants have suffered harm.

"3. The motion of the defendants for an order that all the evidence be reported is denied. This does not appear to be one of the cases where the ends of justice would be promoted thereby.

"4. The plaintiff's motion to recommit to the master for further findings on the questions of undue influence raised by the pleadings is denied. The report sets out the facts as to coercion and undue influence, and I rule that, so far as the deed of January 8, 1891, is concerned, they do not amount to such coercion or undue influence as will avoid the deed. Any finding upon this matter as to the subsequent deeds has become immaterial.

"5. The exceptions of both the plaintiff and the defendants to the master's report appear to be grounded either upon matters of evidence, as to which the master heard oral testimony and as to which his finding respecting weight and credibility will not ordinarily be disturbed, or upon matters which appear to be im-

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material in view of other findings of the master. They are all overruled.

"Let a decree be entered in accordance with this memorandum."

Later, upon a motion for an interlocutory decree, the justice made a further decision of which his memorandum was as follows:

"This cause came on to be further heard upon motion for decree. It was urged by the defendant that by drawing proper inferences from the facts found by the master the plaintiff ought not to prevail. But I find that the inferences fairly to be drawn from the facts found by the master, together with those facts, require the entry of a decree for the plaintiff.

"I do not find that the plaintiff manifested to the defendant a determination to set aside the deeds of property made to her by his father, and I do not find that he made demand upon her for conveyance of his share of the real estate, until November 8, 1904.

"The cause may be recommitted to the master for the purpose of stating the account as to rents and profits received by the defendant of all real estate conveyed to her by deed of her father in 1893, and the fair rental value, net, of the property so conveyed actually occupied by her."

An interlocutory decree accordingly was made, from which the defendants appealed.

The master filed a supplemental report, after which the justice made a final decree, first, that all the conveyances through and under which the defendant Mary Elizabeth Brown obtained property from her father James Brown on March 20, 1893, were null and void so far as the plaintiff was concerned; second, that the master's report on the subject matter of the accounting be confirmed; third, that the defendant Mary Elizabeth Brown pay to the plaintiff the sum of $1,580.76, and that the plaintiff should have execution therefor; fourth, that the plaintiff should recover his costs against the defendant Mary Elizabeth Brown, and that the defendant William F. Brown should recover his taxable costs against the plaintiff.

The defendants appealed from the final decree.

The case was submitted on briefs.

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S. H. Tyng, for the defendants.

J. M. Hall, for the plaintiff.

SHELDON, J. This appeal is without merit.

1. No relief was given against the defendant William F. Brown, but he was allowed his costs. As to him, the bill was in effect dismissed, and he has no ground of complaint.

2. The plaintiff can maintain the suit. All the heirs of the original owner and the executrix of his will are made parties. In her personal capacity the executrix is the sole defendant in interest. It is settled by our decisions that the deed of an insane person is ineffectual to convey a title to land which shall be good against the grantor himself or against his heirs or devisees, unless it is confirmed by the grantor, when of sound mind, or by his guardian, or after his death by his heirs or devisees. *Valpey* v. *Rea*, 130 Mass. 384, and cases cited. *Brigham* v. *Fayerweather*, 144 Mass. 48. *Busiere* v. *Reilly*, 189 Mass. 518. As to undevised property, the rights of heirs are not affected by a will. In such a case, if the deed has been neither ratified nor avoided in the lifetime of the grantor, his heirs may avoid it after his decease; if the invalid deed was made to one of his heirs, the other heirs or any one or more of them according to their respective interests may avoid it in like manner. *Parker* v. *Simpson*, 180 Mass. 334. *Caverly* v. *Simpson*, 182 Mass. 462. *Sunter* v. *Sunter*, 190 Mass. 449. See *Billings* v. *Mann*, 156 Mass. 203. The executor of his will or the administrator of his estate has no power to ratify such a deed to the prejudice of his heirs; *Wilcox* v. *Forbes*, 173 Mass. 63; much less can he do so to the prejudice of the other heirs if, being himself an heir, he is also the wrongful grantee named in the deed. This is not the case of the ratification of a contract relating to personal property by which an ordinary indebtedness or liability is created, to be enforced primarily against the executor himself, and against the heirs only under the provisions of R. L. c. 141, § 26, as was the case in *Bullard* v. *Moor*, 158 Mass. 418. See *Forbes* v. *Douglass*, 175 Mass. 191.

3. No question of ratification by the grantor arises in this case, for his incapacity not only continued but increased continuously until his decease. *Gibson* v. *Soper*, 6 Gray, 279, 281.

4. The probate of the will merely shows that the testator was

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of sufficiently sound mind to make the will; it is not conclusive evidence on the issue in this case. *Gibson* v. *Soper*, 6 Gray, 279. *Sly* v. *Hunt*, 159 Mass. 151.

5. None of the master's findings are shown to have been plainly wrong, and we find no error in any of his reported rulings. See *Long* v. *Athol*, 196 Mass. 497, 508; *American Circular Loom Co.* v. *Wilson*, 198 Mass. 182, 203; *Atherton* v. *Emerson*, 199 Mass. 199, 211. It was for him to fix the limits of time for evidence of the grantor's mental condition. While he might have made those limits narrower, still it must be remembered that the possibility of a ratification of the deeds was to be passed upon, and we cannot say that he went too far. See *Hardy* v. *Martin*, 200 Mass. 548; *Jenkins* v. *Weston*, 200 Mass. 488; *Howes* v. *Colburn*, 165 Mass. 385; *McCoy* v. *Jordan*, 184 Mass. 575. The hypothetical question put to the experts was needlessly long and complicated, and might have been excluded on that ground; but all the assumed facts were found by the master to be proved, and there was no error in law in admitting the question.

6. The defendants do not deny that the plaintiff, upon avoidance of the deeds, is entitled to a share of the net income received from the rented estates; *Robinson* v. *Robinson*, 173 Mass. 233, 239; but they contend that this is not so as to the Vine Street property, because that has been occupied by themselves. This is on the ground that bare occupation by one tenant in common creates no liability to his co-tenants. *Badger* v. *Holmes*, 6 Gray, 118. *Sisson* v. *Tate*, 114 Mass. 497, 501. *Kirchgassner* v. *Rodick*, 170 Mass. 543, 545. *Carroll* v. *Carroll*, 188 Mass. 558. But this does not apply where one co-tenant has ousted his co-tenants, and compelled them to resort to the courts to establish their rights. That is this case. *Silloway* v. *Brown*, 12 Allen, 30, 37, 38, and cases there cited. The female defendant's liability is the same whether she occupied the property in person or received rent therefor from others, just as in *McIntire* v. *Mower*, 204 Mass. 233, 237, 238.

7. As the defendants say in their brief that they waive none of the questions raised on the record, we have examined everything so presented; and we are clearly of opinion that there has been no error prejudicial to either defendant.

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The final decree must be modified by charging each defendant with the costs of this appeal, and by charging the female defendant with interest upon the sum ordered to be paid by her from and after the date of that decree. R. L. c. 177, § 8. So modified, that decree must be affirmed.

So ordered.

COMMONWEALTH *vs.* SILAS N. PHELPS.

Franklin. May 16, 1911. — June 21, 1911.

Present: MORTON, LORING, BRALEY, SHELDON, & RUGG, JJ.

Officer. Arrest. Homicide. Evidence, Of information furnishing ground for suspicion, Of existence of suspicion, Things in evidence. *Constitutional Law. Witness*, Cross-examination. *Practice, Criminal*, Exceptions, Conduct of trial, Interrogation of juror, Isolation of jury in capital case. *Pleading, Criminal*, Indictment. *Jury and Jurors. Words*, "Suspect," "May."

A peace officer, who upon statements made to him by others has reasonable grounds to suspect and does suspect that a felony has been committed and that a certain person was guilty of it, lawfully may arrest such person without a warrant, and if the person thus reasonably suspected kills the officer in resisting the arrest he is guilty of murder.

At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, the Commonwealth may show that at about half past six or seven o'clock on the evening previous to the death of the deputy sheriff, who was killed by the defendant early the next morning, the witness telephoned to the deputy sheriff at a place ten miles away and told him that the defendant "had knifed" a certain superintendent who had discharged him, and asked the deputy sheriff "to come and look after him, take care of him," that at about eleven o'clock that same night the witness saw the deputy sheriff and told him that the defendant drew a knife and stabbed the superintendent and that he said after stabbing him, "I have got you," that the witness also told the deputy sheriff that he saw the doctor who attended the superintendent, and that the doctor told him that the wound was from three to three and one half inches deep by an inch and a half wide, that it "had affected the breathing some" but that the doctor "thought he would recover." *Held*, that the evidence was competent to show what facts had been communicated to the deputy sheriff on which he had acted in attempting to arrest the defendant without a warrant.

It now is settled that a peace officer, who has a right to arrest a certain person without a warrant because he suspects on reasonable grounds that such person has committed a felony, also has a right to break open doors for the purpose of making the arrest.

At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, if it is shown that the

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deputy sheriff was informed by a person, who had seen the events which he described, that a certain factory superintendent had discharged the defendant and that later the defendant, meeting the superintendent and the witness, had drawn a knife and had stabbed the superintendent, the witness illustrating the defendant's action by putting his hand in his pocket and drawing it out in such a way as to show that the knife was open in the defendant's pocket and that the "drawing and striking were practically one movement," that the witness further told the deputy sheriff that immediately after stabbing the superintendent the defendant said, "I have got you," which the jury were warranted in finding meant "I have killed you," and that the witness also told the deputy sheriff that he had seen the doctor who had said that "the wound was three to three and one half inches deep, by an inch and a half wide, that it had affected the breathing some but that he thought he would recover," this authorizes a finding that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed the superintendent with intent to commit murder and thus had committed a felony, and that accordingly the defendant had killed the deputy sheriff in resisting a lawful arrest.

The right of a peace officer to arrest without a warrant a person whom he suspects on reasonable grounds of having committed a felony is not in conflict with the provisions of the Fourteenth Article of the Massachusetts Declaration of Rights or with those of the Fourth Amendment to the Constitution of the United States, which are in restraint of general warrants to make searches.

Where a peace officer has a right to make an arrest without a warrant, he has the right to summon others to assist him in making the arrest, subject to the qualification that he shall use reasonable judgment and no unnecessary violence or force; and what is reasonable depends upon the facts in each particular case.

At the trial of an indictment for the murder of a deputy sheriff, named H, when he was attempting to arrest the defendant without a warrant, where there was evidence warranting a finding that the defendant shot the deputy sheriff with express malice as properly defined by the presiding judge in his charge to the jury, the judge instructed the jury as follows: "If, without warning or notice to H to desist, the prisoner, in cool blood, with express malice in his heart, to gratify feelings of ill will, or hatred, or any feeling which the jury find was express malice, intentionally shot and killed H, you will be warranted in finding the defendant guilty of murder, even though H was acting without right and unlawfully in attempting to make the arrest without a warrant." *Held*, that the instruction was correct and properly was given to the jury.

At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, where there was evidence that the deputy sheriff had been called by telephone from a place ten miles away to come and look after the defendant because he "had knifed" a certain superintendent who had discharged him, the Commonwealth was allowed to show that on his arrival at the place to which he had been called the deputy sheriff said "Si [the defendant] is at it again," the judge instructing the jury that this statement could not be used by them to draw any inferences of fact that any act had been done by the defendant, but only to show the state of mind of the deputy sheriff at the time, with a view to any light it might throw upon his action in connection with his proceedings in making the arrest. *Held*, that the evidence was admissible to prove that the deputy sheriff suspected that the defendant had committed a felony.

At the trial of an indictment for the murder of a deputy sheriff when he was at-

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tempting to arrest the defendant without a warrant, where there was evidence that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed a certain superintendent with intent to commit murder and had summoned a posse of six persons to assist him in arresting the defendant at his house, of which the front door finally was broken in, one of these assistants, in narrating as a witness what took place before the deputy sheriff and two of the posse broke in the front door, testified on his cross-examination that the deputy sheriff placed two men at the back door and said, "The rest of us will go to the front and break in the door," and that the witness considered himself one of "the rest" referred to and went to the front door. The counsel for the defendant then asked this question: "That was the only invitation you had?" to which the witness answered, "He swore us in on the way up, you understand." The defendant asked to have this answer stricken out on the ground that it was non-responsive, and excepted to a ruling of the presiding judge allowing it to stand. *Held*, that the question might have been understood to ask whether the remark of the deputy sheriff was not the only invitation or authority that the witness and the others had from the deputy sheriff to act with him in making the arrest, and that thus understood the answer of the witness was responsive to it.

At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, where there was evidence that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed a certain superintendent with intent to commit murder, the defendant excepted to a part of the charge of the presiding judge which was as follows: "Where a dangerous wound is inflicted, which proves to be a felony through the death of the person wounded, the peace officer is not required to wait until the fact is ascertained whether the assaulted person dies or not. But if, as a reasonable man, he has a suspicion and probable cause to believe that the wound is of such a nature that a felony is likely to result from it through the death of the person wounded, then a condition exists upon which the jury, if they believe the facts, would be justified in finding the officer had probable cause to believe a felony had been committed, because, if the man dies of the dangerous wound, the criminal act dates from [the] time the act was done, and the felony, if ever committed, is committed when the wound is inflicted." *Held*, that this is a correct statement of the law.

At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, where there was evidence that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed a certain superintendent with intent to commit murder, the defendant, in objection to a certain portion of the judge's charge, contended that there was no evidence on which the jury could find that the deputy sheriff had been told that a dangerous wound had been inflicted. A witness testified that he informed the deputy sheriff of the stabbing and told him that the doctor had said to the witness that the wound was "three to three and one half inches deep, by an inch and a half wide, that it had affected the breathing some but that he thought he would recover." *Held*, that whether the statement was one that the wound was dangerous depended largely upon the emphasis put upon the different words used, and that, as emphasis might have been put by the witness on the word "but" and the word "thought" in referring to the expression of opinion by the doctor, this court could not say that the judge was wrong in allowing the jury to find that on the communication made to him the deputy

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sheriff was warranted in suspecting that a wound had been inflicted which was likely to result in death.

At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, there was evidence that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed a certain superintendent with intent to commit murder. There also was evidence warranting a finding that the defendant in fact stabbed the superintendent with murderous intent. The Commonwealth until the evidence was concluded relied on each of these grounds as authorizing the deputy sheriff to arrest the defendant without a warrant. At the close of the evidence the defendant's counsel asked the presiding judge to rule that there was no evidence that a felony had been committed. The judge refused to make this ruling. Thereupon the case was argued and the jury was charged, on the assumption that there was such evidence. At the conclusion of the charge, there was a conference of counsel, and the presiding judge, "the district attorney consenting," charged the jury that there was no evidence that the defendant made an assault on the superintendent with intent to kill, and that the Commonwealth's case in regard to the deputy sheriff proceeding without a warrant then rested solely upon the testimony in regard to the deputy sheriff's suspicion that a felony had been committed, and said to the jury, "You may disregard all the evidence relative to the assault by the defendant upon [the superintendent] except so far as it appears in evidence that the facts in relation thereto were communicated to" [the deputy sheriff]. During the trial and before the district attorney had elected not to press his contention that a felony had been committed, the judge had refused a request of the defendant to order all the evidence in regard to the assault by the defendant on the superintendent stricken from the record except so far as it appeared that the facts had been communicated to the deputy sheriff, and the defendant had excepted to the refusal. *Held*, that the exception must be overruled, because the ruling was right at the time it was made, the evidence having warranted a finding that the defendant had made the assault on the superintendent with intent to commit murder.

Upon an indictment for the murder of a deputy sheriff when he lawfully was attempting to arrest the defendant, it is not necessary in order to prove this crime for the indictment to allege that the person killed by the defendant was a deputy sheriff, because the crime charged is murder, and one way of proving that the killing amounted to murder is to show that the deceased was a deputy sheriff who was killed by the defendant when lawfully proceeding to arrest him.

At the trial of a criminal case, as of a civil one, no exception lies to an alleged statement by the presiding judge in the course of a colloquy with counsel during the trial, which is merely an explanation by him to the objecting counsel of his reason for admitting a question.

At a criminal trial, as at a civil one, the determination whether questions shall be put by the presiding judge to a juror in addition to those prescribed by R. L. c. 176, § 28, is wholly within the discretion of the judge.

In this Commonwealth the defendant in a capital case has not a right to have the jurors who already have been sworn and impanelled kept together during a recess taken by the court before the impanelling of the jury is completed.

At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, there was evidence that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed a certain factory superintendent with intent to commit murder. There also was

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evidence that the defendant in fact stabbed the superintendent with murderous intent, but after the close of the evidence and of the arguments the district attorney, for the purpose of showing the right of the deputy sheriff to arrest the defendant, elected to rely only on the suspicion of the officer on reasonable grounds that the defendant had committed a felony, and consented to an instruction by the judge that there was no evidence that the defendant made an assault on the superintendent with intent to kill. During the trial, and before the district attorney had changed his position, the knife with which the defendant had stabbed the superintendent was admitted in evidence and was marked as an exhibit. The defendant excepted to its admission. When the other exhibits were sent to the jury room the knife was sent with them, and the defendant at that time made no objection. The jury found the defendant guilty of murder, and the defendant argued his exception to the admission of the knife in evidence, objecting to its having gone to the jury as an exhibit when it no longer was material. *Held*, that the knife properly was admitted in evidence, being material evidence at the time it was admitted, and that the defendant, not having made any objection when it was sent to the jury room, could not complain thereof.

LORING, J. The exceptions in this case were taken during a trial which resulted in the defendant being convicted of murder in the first degree.

The circumstances were as follows. Previous to June 11, 1910, the defendant had been employed by the Ramage Paper Company at Monroe Bridge. On coming to work on that day, between five and six o'clock in the afternoon, he found some one else in his place. Thereupon he went into the office of the company and found there one Sibley and one McIntyre. Penman, the superintendent of the Paper Company, soon after came into the office. Penman's story was that he told the defendant that if he could not do better he had better get out and stay out. That the defendant said that no one could put him out. Whereupon he (Penman) told McIntyre to put him out and McIntyre did so peacefully and without trouble. That he (Penman) followed the defendant as he went out and the defendant, when outside the door, turned and said to him (Penman), "I will have your heart's blood before morning"; that about ten minutes after six o'clock Penman and McIntyre met the defendant on the highway and he (Penman) told the defendant that he had better "take a tumble to himself and straighten up," whereupon the defendant, who up to that time had had his hands in his pockets without saying anything, stabbed Penman with a knife "under the left shoulder." McIntyre's account did not differ in substance, but he added that the knife was open when the de-

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fendant took it from his pocket, and "drawing and striking were practically one movement." McIntyre also testified that just after the stabbing the defendant said "I have got you."

The doctor who attended Penman testified that he found a clean cut about an inch and a quarter in length and something like three to three and a half inches deep, on the left side, about the seventh rib, in the axillary line, "in the juxtaposition of the heart, being six inches from the left nipple." There was also evidence that on the afternoon of the day that Penman was stabbed the defendant had said that "'he was going down that night, and if Penman didn't set him to work he would fix that son of a bitch,' meaning Penman."

McIntyre further testified that at about half past six or seven he telephoned to Haskins, the deceased, who was a deputy sheriff at Charlemont, and told him that the defendant "had knifed Penman, and asked him to come and look after him, take care of him"; Charlemont was some ten miles distant, and McIntyre saw Haskins at Monroe Bridge at about eleven o'clock that same night. McIntyre then testified in these words: "I told him that Si came into the office, and Mr. Penman had fired him, discharged him, and on going up the hill, we met him again, and that Penman had asked him, putting up his hand, what he meant by this business, and that Si drew a knife and stabbed him, (and illustrated by putting his hand in his pocket and the striking.) . . . I told him that he said, 'I have got you,' after stabbing. I told him also of seeing the doctor who attended Penman, and that the doctor had told me that the wound was three to three and one half inches deep, by an inch and a half wide, that it had affected the breathing some but that he thought he would recover."

The circumstances of the killing told by a number of witnesses produced by the government was in substance as follows: Haskins met McIntyre and four other men in a barn at about twenty minutes after eleven at night, and arranged to go to the defendant's house with those then present and two more, and arrest him at daybreak. One of the four seems to have backed out, and at about half past three o'clock in the morning Haskins, McIntyre and five other men started for the defendant's house. They arrived there about four o'clock. The sun was due to

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rise on June 12 at seven minutes after four. When they arrived at the house Haskins rapped on the door and said in a loud voice: "I am Sheriff Haskins, come to arrest Silas Phelps for the knifing of Mr. Penman." That "He had better come quietly, and make no trouble; that would be best for all concerned." No answer being given Haskins rapped again, and again called out, stating who he was and calling upon the defendant to give himself up. There still being no answer Haskins rapped again, and again stated who he was and again called upon the defendant to give himself up. He then called on the defendant's wife to open the door and she said that she would not do so. Haskins asked if she realized that she was hindering an officer in the performance of his duty. To this she gave no answer. Again Haskins rapped and asked the defendant's wife to open the door, and she said that she would not do so. Haskins then asked if the defendant was at home and she said that he was not. After posting two men at the back of the house Haskins, McIntyre and one Tower broke in the front door and went into the kitchen, and as they did so steps were heard ascending the stairs, whereupon Haskins went to the foot of the stairs "and moved his body forward into the opening of the door of the stairway," and said, "Come, Si, I see you. Come on down now," and that he was then shot down by the defendant, who stood at the top of the stairs, and died in a few seconds. Haskins was shot at the top of the breast bone in the centre line. The defendant soon after appeared at a window of the house and told the posse to leave or he would begin shooting again. They left. The defendant took to the woods and was captured on June 15, three days later.

There was also evidence that the defendant had said that Haskins "swore a false oath against" him a year before, in the "Shippee case," and "that he would shoot him [Haskins] if he ever came to arrest him again." That Haskins "swore to a damn lie when he had me to Greenfield, and he never will swear to another one, nor he never will arrest me. He will die or I shall." "I don't know whether he told him, but that is what he told me, and he told others the same thing, too, what he told me. 'Emmett, by God! you will never arrest me again. Either you will be a dead man or I will.' Emmett says, 'may be you and

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may be me.' He (meaning the defendant) says to Emmett, 'By God! Emmett, you never will arrest me again.' . . . Emmett says, 'it may be you and may be me,' and he (meaning the defendant) said, 'I know damned well it will be you.'" That if Haskins ever came to arrest him again "he won't take me alive."

These or similar statements had been repeated by the defendant a number of times. Further, on the night of the day Penman was stabbed the defendant said that "he was going down that night, and if Penman didn't set him to work he would fix that son of a bitch," and that on the next morning he telephoned to a cousin, who was a selectman of Monroe Bridge, "There is a corpse here for you. They came up here and smashed right in and I just stopped them. . . . I shot him. . . . I shot to kill."

There was a conflict in the evidence which it is not necessary to speak of in detail. It is enough to say that the defendant testified that Penman began the quarrel and he stabbed him in self defense; that on the morning of June 12 he did not recognize Haskins's voice, and that the shot gun that killed him was discharged by accident.

The Commonwealth put its case on three grounds, namely: (1) That in stabbing Penman the defendant committed a felony and therefore Haskins had a right to arrest the defendant without a warrant; (2) that on facts communicated to him by McIntyre Haskins had reasonable ground to believe and did suspect that a felony had been committed; and (3) that the defendant shot Haskins with express malice out of hatred and for revenge. Whether a felony had or had not been committed in this case depended upon whether the defendant stabbed Penman with intent to commit murder, for that is punishable by imprisonment in the State prison (R. L. c. 207, § 15) and so is a felony. R. L. c. 215, § 1.

At the conclusion of the evidence the defendant's counsel asked the presiding judge * to rule that there was no evidence that a felony had been committed. This was refused. Thereupon the case was argued and the jury were instructed on that

* *Schofield*, J.

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footing. After a conference with counsel on the conclusion of the charge the presiding judge, "the district attorney consenting," charged the jury "that there was no evidence that Phelps made an assault upon Penman with intent to kill." The judge went on and instructed the jury that the Commonwealth's case in regard to Haskins's proceeding without a warrant "now rests" solely upon the testimony in regard to Haskins's suspicion that a felony had been committed, and told them: "You may disregard all the evidence relative to the assault by the defendant upon Penman, except so far as it appears in evidence that facts in relation thereto were communicated to Haskins."

Before taking up the several exceptions taken by the defendant, we will deal with a question which is a fundamental one in this case, namely, the right of an officer to arrest on suspicion of felony. It was laid down by Chief Justice Shaw in *Commonwealth* v. *Carey*, 12 Cush. 246, 251, that "if a constable or other peace-officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful." If it was intended by this statement in *Commonwealth* v. *Carey* to make a distinction between the fact of suspicion where the officer had reasonable ground to believe, and the fact of suspicion where he had reasonable grounds to suspect that a felony had been committed, the defendant in the case at bar had the benefit of the difference. But it was pointed out in *Jackson* v. *Knowlton*, 173 Mass. 94, 97, that the word "suspect" is ordinarily used in place of "believe" in stating what the officer must have reasonable grounds of. If, as is undoubted law, it is enough that the officer suspect that a felony has been committed, it must be enough that he had reasonable grounds to suspect. And (as stated in *Jackson* v. *Knowlton*) the authorities are to that effect. See *Rohan* v. *Sawin*, 5 Cush. 281, 285; 5 Bac. Abr. 588; *Beckwith* v. *Philby*, 6 B. & C. 635; *Davis* v. *Russell*, 5 Bing. 354. The cases are collected in 2 Am. & Eng. Encyc. of Law, (2d ed.) 870. We shall hereafter speak of the rule accordingly.

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We will take up the several exceptions in the order of the defendant's brief.

1. The first thing complained of by the defendant is that when the district attorney elected to withdraw his contention that a felony had been committed the judge told the jury: "You may disregard all the evidence relative to the assault by the defendant upon Penman, except so far as it appears in evidence that facts in relation thereto were communicated to Haskins." The defendant's contention is that the judge should have told the jury that "they must," not that "they may" disregard that evidence. In our opinion there was evidence which warranted a finding that the defendant stabbed Penman with intent to commit murder. This statement of the presiding judge was not made to cure an error previously made (as was the case in *Farnum* v. *Farnum*, 13 Gray, 508, and *Commonwealth* v. *Edgerly*, 10 Allen, 184, relied on by the defendant), but to give the necessary instructions consequent on the change which had taken place in the government's case. The judge's attention was not called to the use of the word "may" in place of "must" in this part of the charge. The one exception taken to it was as to the use of the word "suspicion" in place of "belief" that a felony had been committed. But apart from that it is plain on reading the whole of this additional instruction that the word "may" was used as a word of command and not as a word of permission, and that this could not have been misunderstood by the jury.

2. The next exceptions are those taken to the communications over the telephone made by McIntyre to Haskins when he (Haskins) was at Charlemont on the afternoon of June 11; and those made by him to Haskins in the evening of the same day, after Haskins had come to Monroe Bridge. This evidence was competent to show that facts had been communicated to Haskins on which he acted in attempting to arrest the defendant without a warrant.

3. The first, third and fifth rulings asked for * could not have

* The rulings thus requested were as follows:

"1. That, as a matter of law, upon all the evidence, the defendant cannot be convicted of murder; that upon all the evidence, the only question for the jury is whether the defendant is guilty of manslaughter."

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been given because the evidence warranted a finding that Haskins had reasonable ground to suspect and did suspect that the defendant had stabbed Penman with intent to murder. The first ruling asked for could not have been given for the additional reason that the evidence warranted a finding that the defendant killed Haskins with express malice, out of hatred and revenge. The sixth ruling asked for,* if given, would have been likely to mislead.

There was evidence warranting a finding of express malice in the killing of Haskins, and the ruling requested did not cover the whole subject. The instruction given was full and accurate.†

"3. The deceased, not having a warrant for the arrest of the defendant, was unlawfully upon the defendant's premises."

"5. If the deceased was attempting to arrest the defendant for a past offense, not felony, without a warrant, and if the defendant in resisting such arrest, killed the deceased, he cannot be convicted of murder."

* "6. If the defendant was resisting an unlawful arrest and took the life of Emmett F. Haskins, the party attempting to arrest him, he is not guilty of murder."

† "The killing by reason of provocation, in the attempt unlawfully to arrest, would be deemed by the law to be killing without malice aforethought. That is the rule where no other facts appear except the fact of an attempt to arrest without authority of the law, where the person making the arrest is proceeding in an orderly and proper manner, for the purpose of making the arrest, where he is resisted. In the case where the person attempting to make the arrest uses unnecessary violence, an unreasonable degree of force, that action on the part of the person attempting to make the arrest justifies on the part of the person who is sought to be arrested a right to use force to meet the unnecessary violence. But the simple rule in the case that I have stated, where a peace officer is attempting, without a warrant, and unlawfully, to arrest a person, proceeding in an orderly manner to affect [effect] the arrest, is resisted, and in the course of the resistance the person sought to be arrested kills the officer, although it is an unlawful act, no other facts appearing than those I have stated to you, the law says that it is not homicide with malice aforethought, which is necessary to constitute murder, but will, in contemplation of law, be manslaughter. Of course, in any case, other facts might appear which would show that the defendant had a right to resist on ground of self defense or otherwise, and if acting within the right of self defense, he proceeded to the extremity of killing, on the ground of self defense, then there would be no criminal liability whatever. But in an unlawful arrest, where the officer or person seeking to make the arrest proceeds in the usual ordinary manner, for the purpose of taking the person sought to be arrested into custody, that is not a kind of

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4. An officer who has the right to arrest without a warrant because he suspects on reasonable grounds that the defendant

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violence, if nothing more appears, which justifies the taking of life to prevent it. Doing so is an unlawful act, nothing more appearing, but the law deems the attempt to arrest by one having no authority a provocation which, in concession to the frailty of human nature, leads to a mitigation of the offense and to the treatment of it, not as a homicide with malice aforethought, but the lesser crime, namely manslaughter.

"In this case there is testimony from several witnesses that the defendant, the prisoner at the bar, upon several occasions, spoke of the deputy sheriff and used expressions in regard to him and in regard to what would happen if the deputy sheriff should attempt to arrest him again, from which the Commonwealth asks the jury to believe that this defendant, the prisoner at the bar, had towards the deputy sheriff express malice; that he had in his mind feelings of ill will or hostility toward the deputy sheriff. It is a question of fact, gentlemen, for you to decide upon the evidence in the case whether such is the truth. The instructions that I have just given in regard to the criminal responsibility of the defendant, if the deputy sheriff was killed by him in the course of affecting [effecting] an unlawful arrest, was on the assumption that no express malice was proved. I shall now instruct you upon the assumption that you do in fact find that there was express malice in the mind of this defendant, the prisoner at the bar, toward the deputy sheriff, Emmett F. Haskins.

"Express malice means an actual state of mind existing in the heart of the defendant towards the deputy sheriff of ill will, or hatred, or dislike, or kindred feelings. Where express malice is shown to exist on the part of the person sought to be arrested, against the person who attempted to arrest him, and where he kills the person, where he intentionally kills the person who sought to arrest him, through express malice, a different rule of criminal responsibility applies from that which exists where the killing in resistance of an unlawful arrest was without any proof or evidence of express malice. In this case, assuming now that the deputy sheriff was acting without authority of law in attempting to arrest Phelps, if Phelps knew Haskins was the man at the foot of the stairs, and also knew that Haskins intended to do no bodily harm to him or to any member of his family, or any injury to his habitation, but only to arrest and take him into custody, and if he had no apprehension or reasonable ground for apprehension of any such bodily harm or danger of harm from Haskins or those with Haskins, and if without warning or notice to Haskins to desist, the prisoner, in cool blood, with express malice in his heart, to gratify feelings of ill will, or hatred, or any feeling which the jury find was express malice, intentionally shot and killed Haskins, you will be warranted in finding the defendant guilty of murder, even though Haskins was acting without right and unlawfully in attempting to make the arrest without a warrant. If you find further, by the degree of proof which I have referred to and shall later refer to again, if he intentionally shot, if the intentional shooting was

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has committed a felony, has a right to break open doors. That may be taken to be settled now. 4 Bl. Com. 292. 1 Hale P. C. 588. 2 Hale P. C. 94. *Semayne's case*, 5 Co. 91 a, although, as is pointed out in 1 Hale P. C. 588, there was formerly authority to the contrary. See also Foster's Crown Law, 321; 2 Hawk. P. C. c. 14, § 7.

The defendant relies on the fact that Bigelow, J., in *McLennon* v. *Richardson*, 15 Gray, 74, 77, in enumerating the cases where a constable has authority "to break open doors and arrest without a warrant," did not include the case where there is a suspicion of felony as well as a felony. That cannot be taken (in connection with the question there under discussion) to mean that an officer who has a right to arrest without a warrant does not have a right to break open doors. The two were treated as standing on the same footing, and in the enumeration the right to arrest on suspicion of felony (that not being there in question) was omitted. The ninth, twelfth and seventeenth requests * were rightly refused.

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deliberately premeditated in the sense I have explained deliberate premeditation, you will be justified in finding the defendant guilty of murder in the first degree, even though Haskins was acting without right and unlawfully in attempting to make the arrest without a warrant."

* The rulings thus requested were as follows:

"9. There being no evidence that Haskins had a warrant for the arrest of this defendant, and if no felony had been committed, Haskins had no business to enter the defendant's house in the night time for any purpose, and if he did so enter, and was killed by the defendant, in defense of his person, his family or his property, it was a justifiable or excusable homicide and the defendant cannot be convicted of murder or any other offense."

"12. There being no evidence that Haskins had a warrant for the arrest of the defendant; that the defendant was a fugitive from justice, and in the act of fleeing, but was in his own house, with his family, Haskins had no right to surround said house with an armed posse, and had no right to forcibly enter said house for any purpose, and if he did so enter and was killed by the defendant, either through fear of personal bodily harm, for his life, or the lives of his family, the defendant was not obliged to retreat, but could use such force in repelling the assault as was necessary, even to the extent of taking the life, or lives of the persons so entering, and the act of said taking of said life would be excusable or justifiable homicide, and the defendant would not be guilty of any offense."

"17. That said Haskins had no legal right, without having a warrant in his possession, properly issued for the arrest of the defendant, Silas N. Phelps,

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5. The eleventh request* was rightly refused even if there had been no reasonable ground to suspect that a felony had been committed. But the request assumes that there was not such evidence, and that question is also raised by the fourth and eighth requests† for rulings. We are of opinion that there was such evidence. What Haskins was told by McIntyre was that Penman had discharged the defendant and later the defendant, on meeting Penman and McIntyre, had drawn a knife and stabbed him, "and [McIntyre] illustrated by putting his hand in his pocket and the striking." This illustration must be taken to have meant that the knife was open in the defendant's pocket and that the "drawing and striking were practically one movement," as McIntyre testified was the fact. Haskins was further told by McIntyre that immediately after stabbing Penman the defendant said "I have got you," which the jury were warranted in finding meant "I have killed you"; and also that he (McIntyre) had seen the doctor who said "the wound was three to three and one half inches deep, by an inch and a half wide, that it had affected the breathing some but that he thought he would recover." This authorized a finding that Haskins suspected on reasonable grounds that the defendant

to break and enter, in the night time, into the dwelling house of the defendant, then occupied by the defendant and his family, and if, without such warrant, the said Haskins did, in the night time, break and enter said dwelling house, and the defendant thereupon shot and killed him, in said dwelling house, the defendant is not guilty of murder in so doing."

* The ruling thus requested was as follows:

"11. There being no evidence that Haskins had a warrant for the arrest of this defendant, and Haskins having no reasonable ground to suspect that a felony had been committed, Haskins had no business to enter the defendant's house in the night time, for any purpose, and if he did so enter and was killed by the defendant, in defense of his person, his family or his property, it was justifiable or excusable homicide and the defendant cannot be convicted of murder or any other offense."

† The rulings thus requested were as follows:

"4. On all the evidence, the deceased had no reasonable ground to believe that the defendant was guilty of felony, and the attempted arrest of the defendant in his house without such reasonable ground was an unlawful act on the part of the deceased and the defendant cannot be convicted of murder."

"8. In order to justify the act of the deceased, the burden is upon the Commonwealth to prove beyond a reasonable doubt that a felony had been committed, and that the officer had reasonable cause to believe that the defendant was the person who committed such felony."

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had stabbed Penman with intent to commit murder and so that a felony had been committed. It is to be noted that it is not necessary that the communication which induces the officer to suspect that a felony had been committed should in terms state that a felony has been committed or facts which of necessity mean that. It is enough that the communication "in its popular sense would import such charge." *Commonwealth* v. *Carey*, 12 Cush. 246, 251, 252.

The further objection made by the defendant that an arrest without a warrant is in conflict with the Fourteenth Article of the Declaration of Rights of the Constitution of the Commonwealth was disposed of in *Rohan* v. *Sawin*, 5 Cush. 281. It was there stated that those provisions were in restraint of general warrants to make searches and that they do not conflict with the authority of officers or private persons under proper limitations to arrest without a warrant when authorized by the common law or by statute. To the same effect see *Wakely* v. *Hart*, 6 Binn. 316. The same is true of the Fourth Amendment to the Constitution of the United States.

6. The defendant took an exception to what was said in the charge as to the right of Haskins "to take all measures that are reasonably necessary to affect [effect] the arrest," if he had a right to arrest without a warrant. The presiding judge said in that connection: "He [the officer] has a right to summon others to assist him in making the arrest, subject always to the qualification that he shall use reasonable judgment and no unnecessary violence or force. What would be reasonable on the part of a peace officer in proceeding to make an arrest depends upon the facts in each particular case. It is the duty of the jury to consider all of the circumstances shown by the evidence in this case in passing judgment upon the question whether the peace officer used reasonable judgment in executing the authority which the Commonwealth contends was conferred upon him by law to make the arrest." There was evidence that of the six men who accompanied Haskins one had a rifle, one a shot gun, two each had a revolver and in addition Haskins had a revolver which remained in its holster until it was taken from it after his death. We see no error in this part of the charge.

7. The presiding judge instructed the jury that "If without

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warning or notice to Haskins to desist, the prisoner, in cool blood, with express malice in his heart, to gratify feelings of ill will, or hatred, or any feeling which the jury find was express malice, intentionally shot and killed Haskins, you will be warranted in finding the defendant guilty of murder, even though Haskins was acting without right and unlawfully in attempting to make the arrest without a warrant." To this the defendant took an exception. The whole of the charge on express malice has been stated above in full. We are of opinion that this exception also must be overruled. The only argument in support of it not already disposed of is that there was no evidence that the defendant killed Haskins for any other reason or purpose than by accident or to avoid arrest. It is enough to say without repeating the evidence already stated that there was evidence that warranted a finding that the defendant shot Haskins with express malice as defined in the charge. For similar cases see *Rafferty* v. *People*, 72 Ill. 37. *Muscoe* v. *Commonwealth*, 86 Va. 443. *State* v. *Holcomb*, 86 Mo. 371.

8. Under the defendant's objection and exception the judge allowed the Commonwealth to prove that on his arrival at Monroe Bridge Haskins said, "Si is at it again." This was admissible to prove that Haskins did suspect that the defendant had committed a crime. The judge in his charge instructed the jury that it could not be used by them to draw any inferences of fact that any act had been done by the defendant but only to show the state of mind of Haskins at the time, with a view to any light it might throw upon his action in connection with his proceedings in making the arrest. This exception must be overruled.

9. In narrating what took place before Haskins and two of the posse broke in the front door, McIntyre testified on cross-examination that Haskins placed two men at the back door and said, "The rest of us will go to the front, and break in the door." That he (McIntyre) considered himself one of the "rest of us" and went to the front door. The counsel for the defendant then asked this question: "That was the only invitation you had," to which McIntyre answered, "He swore us in on the way up, you understand." The defendant asked to have the answer stricken out as not responsive, and excepted to the

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ruling that it should stand, on the same ground. We are of opinion that the counsel's question might have been understood to mean that this remark was the only invitation or authority which McIntyre and others had from Haskins to act with him in making the arrest, and so was responsive to the question. This exception must be overruled.

10. The defendant excepted to the statements as to "suspicion" made in the further charge to the jury after the district attorney had consented to waive his claim that a felony had been committed. This has already been dealt with.

11. The defendant excepted to that part of the charge in which the judge instructed the jury that: "Where a dangerous wound is inflicted, which proves to be a felony through the death of the person wounded, the peace officer is not required to wait until the fact is ascertained whether the assaulted person dies or not. But if, as a reasonable man, he has a suspicion and probable cause to believe that the wound is of such a nature that a felony is likely to result from it through the death of the person wounded, then a condition exists upon which the jury, if they believe the facts, would be justified in finding the officer had probable cause to believe a felony had been committed, because, if the man dies of the dangerous wound, the criminal act dates from [the] time the act was done, and the felony, if ever committed, is committed when the wound is inflicted." The defendant's first contention is that this is not correct as matter of law. It is supported by the authority of Sir Matthew Hale, who says in 2 Hale's Pleas of the Crown, 94: "If A. hath wounded B. so that he is in danger of death, and A. flies and takes his house and shuts the doors, and will not open them, the constable of the vill where it is done, or upon hue and cry, may break the doors of the house to take him, if upon demand he will not yield himself to the constable. 7 E. 3, 16. b. Barre, 291." We are of opinion that as matter of law it is correct. The defendant's second contention is that there was no evidence on which the jury could find that Haskins had been told that a dangerous wound had been inflicted. He had been told that the doctor had told McIntyre that the wound was "three to three and a half inches deep by an inch and a half wide, that it had affected the breathing some but that he

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thought he would recover." Whether that was a statement that the wound was a dangerous one depends largely on the emphasis put upon the different words used. The statement was not that he would recover, but that the doctor "thought" he would recover. Again, the statement was not "and" the doctor thought he would recover. The statement was "but" the doctor thought he would recover, which well might be taken to mean "but in spite of that the doctor thought he would recover." If emphasis is put upon these two words we cannot say that the judge was wrong in allowing the jury to find that on the communication made to him Haskins was warranted in suspecting that a wound had been inflicted which was likely to result in death. This exception must be overruled.

12. By his second request the defendant asked "That the court order all the evidence relative to the assault by Phelps upon Penman stricken from the record, except so far as it appears in evidence that the facts in relation thereto were communicated to Haskins." This request was made and the exception taken to the refusal to give it was taken before the district attorney elected not to press his contention that there was evidence that a felony had been committed. When the request was made and the exception taken, the ruling asked for was rightly refused because the evidence warranted a finding that the assault upon Penman was an assault with intent to commit murder. The request was not renewed after that change in position on the part of the district attorney. The rights of the defendant upon that change being made were fully secured to the defendant by the judge's direction to the jury to disregard all evidence relative to the assault except so far as they appear to have been communicated to Haskins, which has been already dealt with, *supra*.

13. The fifth request for a ruling * could not have been given because there was evidence that the defendant suspected on reasonable grounds that a felony had been committed, and because there was evidence that in shooting Haskins the defendant acted with express malice.

14. The next exception is to the admission in evidence of the

* Quoted *ante* at foot of page 406.

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fact that Haskins was a deputy sheriff. The ground of this exception is that that fact is not alleged in the indictment. But the crime for which the defendant was indicted was murder. One way of proving that the killing amounted to murder was that Haskins was killed by the defendant while resisting arrest by Haskins, who was lawfully endeavoring to arrest him. That is matter of evidence, not of allegation. It is none the less matter of evidence and not of allegation in an indictment for the killing, because if Haskins had not been killed and Phelps had sued him in a civil suit he would have had to plead those facts as his justification. *Brown* v. *State*, 33 Vroom, 666. *Keady* v. *People*, 32 Col. 57. *Wright* v. *State*, 18 Ga. 383. *Dilger* v. *Commonwealth*, 88 Ky. 550.

15. The defendant excepted to a statement made by the judge under the following circumstances: "Witness was asked a question, and in the course of a discussion as to its admissibility, between the court, district attorney and Mr. Davenport, the court made the following statement: . . . I assume the connection is being evidence that he was called by telephone call, evidence that very soon after receiving the call, he went, and the argument to the jury is that he went in obedience to the call, and went as a deputy sheriff, in the execution of his office." On the defendant's excepting to that statement the judge added "I do not make that as a statement, but that is the purpose. I said that is what suggested itself to me when the evidence was offered along that line." All that the judge did was to explain to counsel his reason for admitting the question and this was made plain by the explanation given by him on the defendant's taking his exception.

16. The defendant's exception to the refusal of the judge to interrogate each juror as to his having read an article then before the court in the Greenfield Recorder is not well taken. Whether any questions shall be put to the persons called as jurors in addition to those prescribed by R. L. c. 176, § 28, is a matter lying within the discretion of the presiding judge. *Commonwealth* v. *Gee*, 6 Cush. 174. *Commonwealth* v. *Poisson*, 157 Mass. 510. *Commonwealth* v. *Thompson*, 159 Mass. 56. *Commonwealth* v. *Warner*, 173 Mass. 541. The defendant's motion was limited to a request that the jurors be interrogated on

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this subject. There was no offer to introduce evidence *aliunde* that these persons did not stand indifferent. We find nothing in the cases cited by him which helps the defendant.

17. We know of no case in this Commonwealth or elsewhere in which it is held that the defendant in a capital case has a right to have the jurors who have been sworn and impanelled kept together during a recess taken by the court before the impanelling of the jury is completed.* For cases to the contrary see *Tooel* v. *Commonwealth*, 11 Leigh, (Va.) 714; *Epes' case*, 5 Gratt. 676; *State* v. *Burns*, 33 Mo. 483.

18. At the argument the defendant complained that the knife with which the defendant stabbed Penman was sent out with other exhibits to the jury room. It was properly admitted in evidence and marked as an exhibit before the district attorney changed his position. The only exception taken by the defendant was that then taken. This exception must be overruled. The defendant cannot complain now that since the district attorney had changed his position the knife should not have been sent into the jury room. The defendant made no objection to that at the time and cannot now complain of it.

We have discussed all exceptions argued by the defendant. In addition we have considered all taken by him but not argued, and we have found no errror in any of the rulings to which they were taken.

The entry must be

Exceptions overruled.

W. A. Davenport, (*H. E. Ward* with him,) for the defendant.

R. W. Irwin, District Attorney, (*C. N. Stoddard* with him,) for the Commonwealth.

* During the impanelling of the jury, the court took a noon recess, and the defendant's counsel requested the judge that the jurors already sworn and impanelled might be kept together during the noon recess, under the care of the officers. The judge refused so to rule, and permitted the jurors to separate and to return into court at two o'clock. To this ruling the defendant excepted.

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EQUITABLE TRUST COMPANY OF NEW YORK, trustee, *vs.* CLARENCE H. KELSEY, receiver, & another.

Suffolk. March 20, 1911. — June 22, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Equity Jurisdiction, Subrogation. *Tax*, Collection. *Receiver*.

A corporation, organized under the laws of the State of New York, had made a mortgage to secure its bonds covering certain real estate in this Commonwealth. In the mortgage the corporation covenanted with the trustee to pay and discharge all taxes and assessments lawfully imposed upon the mortgaged property. The corporation became insolvent, and a receiver was appointed in the State of New York, who also was appointed ancillary receiver of the property of the corporation in this Commonwealth. The trustee under the mortgage instituted proceedings in this Commonwealth to sell the real estate here at foreclosure sale. Before the trustee took possession of the real estate in this Commonwealth under the mortgage, the city in which it was situated assessed a tax upon it and threatened to sell it for non-payment of taxes. The ancillary receiver refused to pay the tax, although he had in his hands in the ancillary proceedings in this Commonwealth assets more than sufficient to pay it. While the foreclosure proceedings still were pending and the tax remained unpaid, the trustee under the mortgage brought a bill in equity against the receiver and the collector of taxes, alleging the foregoing facts and that a sale by the plaintiff of the property subject to the tax lien would be to the detriment of the bondholders, and praying that the receiver might be ordered to pay the tax or that the plaintiff might pay it and be subrogated to the rights of the collector of taxes against the receiver. The defendant receiver demurred. *Held*, that the demurrer must be overruled, because the plaintiff in order to protect the trust property from an incumbrance, which it was the duty of the insolvent corporation under its covenant with the trustee to pay, was compelled to pay the debt of the corporation to the city, and, upon such payment, the plaintiff was entitled to be subrogated, not only to the rights of the taxpayer as respected the lien on the land, but also to the rights of the tax collector against the fund held by the receiver in this Commonwealth; and that the fact that the tax collector under St. 1909, c. 490, Part II. § 64, might collect the tax by an action against the plaintiff was immaterial.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 23, 1911, by the Equitable Trust Company of New York, a corporation, as trustee under a mortgage made by the Standard Cordage Company, also a New York corporation, to secure its bonds, covering, among other properties, certain parcels of real estate in Boston commonly known as the Sewall and Day mill

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and the Pearson mill, alleging that the plaintiff in the performance of its duty as such trustee instituted foreclosure proceedings to sell the real estate at foreclosure sale, that at the time of the filing of the bill such foreclosure proceedings were pending and that the plaintiff was in possession of the properties but it was not in possession of them before December 21, 1910, that by proceedings in the State of New York begun on March 16, 1910, the cordage company was dissolved by a final order made on September 24, 1910, and one Kelsey was appointed the receiver of its property, that Kelsey instituted ancillary proceedings in the Supreme Judicial Court of this Commonwealth and on February 20, 1911, was appointed receiver of all the properties and rights of the cordage company in this Commonwealth, that in the mortgage, above referred to, the cordage company covenanted with the plaintiff to pay and discharge all taxes and assessments lawfully imposed upon the mortgaged property, that on April 1, 1910, the cordage company was in possession of the real estate in question and on that day taxes were assessed upon it by the city of Boston under St. 1909, c. 490, Part I. § 15, to the amount of $7,470.20, that neither the cordage company nor the receiver ever contested the validity or the propriety of such assessment, that the taxes were payable on October 1, 1910, and that interest had been accruing thereon since November 1, 1910, that no part of such taxes had been paid and that the defendant Kelsey refused to pay such taxes, that the assets in the hands of the defendant Kelsey as receiver in the ancillary proceedings exceeded in value $30,000, and that there were no obligations of the cordage company or of the receiver by reason of debts due to the United States or debts due to or taxes assessed by this Commonwealth or by any county, city or town except the taxes mentioned above, that the defendant Parker as collector of taxes of the city of Boston had done all acts which were conditions precedent to a lawful sale of such real estate for non-payment of taxes and threatened to sell the real estate if the taxes remained unpaid, that it was the duty of the plaintiff to procure a sale of the properties in the foreclosure proceedings at as high a price as possible, and that if the properties were sold subject to the lien for taxes the proceeds of the sale would be diminished to the detriment of the holders of the mortgage

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bonds, that the value of the properties in this Commonwealth covered by the mortgage were far less than the amount due to the plaintiff as trustee under the terms of the mortgage and that the cordage company was hopelessly insolvent. The bill prayed, first, that the receiver should be ordered to pay such taxes; second, that, if this relief was not granted, or if the receiver should not pay the taxes forthwith, the plaintiff should be authorized by the court to pay the taxes, and, upon such payment, that it should be subrogated to the rights of the defendant Parker, as collector, to prove the claim for the taxes against the receiver in the ancillary proceedings and to receive payment thereof from the assets then held, or thereafter to be held, by such receiver, with the same right to have the claim paid in priority to all other claims against the receiver or which the defendant Parker, as collector, would have or might have had, upon proof by him of such claim against such receiver; and third, for general relief.

The defendant Kelsey, receiver, demurred to the bill.

The demurrer was heard by *Hammond*, J., who at the request of the parties sustained it *pro forma*, and reported the case for determination by the full court.

A. S. Hall, for the defendant Kelsey.

E. H. Warren, for the plaintiff.

HAMMOND, J. The tax was assessed to the Standard Cordage Company, hereinafter called the company; and although there was a lien upon the land the primary liability was upon the company. *Webber Lumber Co.* v. *Shaw*, 189 Mass. 366. By the terms of the mortgage, as between the company and the plaintiff, it is the duty of the company to pay the tax. The tax collector can collect the tax by proving it as a preferred claim against the fund held by the receiver in this Commonwealth (R. L. c. 150, § 29), or by taking measures to enforce the lien upon the land. He threatens to take the latter course. The plaintiff therefore in order to protect its own property from an incumbrance which it is the duty of the company, as between it and the plaintiff, to pay, is compelled to pay a debt of the latter. Upon the payment of the tax the plaintiff is clearly entitled to be subrogated to the rights of the taxpayer so far as respects the lien upon the land. *Eagle Fire Ins. Co.* v. *Pell*, 2 Edw. Ch. 631, 634. *Farmer* v. *Ward*, 5 Buch. 33. Jones on Mortgages, (6th ed.) § 358.

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And to render complete justice he is also entitled to the rights of the tax collector against the fund held by the receiver in this Commonwealth. *In re Moller*, 8 Bened. 526. As bearing upon the general principle see *In re Lord Churchill*, 39 Ch. D. 174; *Orem* v. *Wrightson*, 51 Md. 34; *Zell's appeal*, 111 Penn. St. 532. The fact that the tax collector may under St. 1909, c. 490, Part II. § 64, collect the tax by an action against the plaintiff is immaterial. The company is still liable as is the fund in the receiver's hands.

There is nothing in this conclusion inconsistent with *Swan* v. *Emerson*, 129 Mass. 289, upon which the receiver relies. It is apparent that in that case the purchaser at the foreclosure sale bought subject to the taxes and that the person to whom the tax was assessed owed to the purchaser no duty in the matter.

Demurrer overruled.

WILLIAM DWYER *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY & another.

Suffolk. March 21, 1911. — June 22, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Equity Jurisdiction, To enjoin public nuisance. *Nuisance. Grade Crossing. Damages.*

The owner of land used for the storage of boats cannot maintain a bill in equity against a railroad corporation to restrain the defendant from constructing a conduit which will diminish the flow of a certain creek so that access to the plaintiff's land will be impaired and the waters of the creek, which is an arm of the sea, will "ebb and flow upon the plaintiff's premises in such a way as to render them useless for the purpose of storing boats thereon," because the act of which the plaintiff complains is a public nuisance and he alleges no such peculiar damage as will entitle him to maintain a private suit or action.

One, whose land suffers injury from the manner in which a certain conduit is constructed by a railroad corporation under a decree in proceedings for the abolition of a grade crossing, is not entitled to be heard in such proceedings and has no standing to enforce the abolition decree, if the damage of which he complains was not of a different kind from that suffered by the public.

BILL IN EQUITY, filed in the Supreme Judicial Court on August 9, 1910, by the owner of certain land in that part of Boston called Dorchester against the New York, New Haven, and Hartford

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Railroad Company and the Old Colony Railroad Company, to restrain the defendants from constructing, in connection with proceedings for the abolition of a certain grade crossing, any conduit affecting the flow of the waters of Tenean Creek, an arm of the sea, in and upon the land of the plaintiff, the paragraph of the bill containing the material allegations being quoted in the opinion.

The defendants demurred to the bill.

The case was heard upon the demurrer by *Rugg*, J., who made a decree that the demurrer be sustained and that the bill be dismissed with costs. The plaintiff appealed.

S. H. Tyng, (*R. J. Dwyer* with him,) for the plaintiff.

F. H. Nash, for the defendants.

HAMMOND, J. The eighth paragraph of the bill is as follows: "The plaintiff's said parcel of land has for a long time past been used for the storage of row boats, sail boats, and motor boats during all the months of the year, and the said parcel of land affords a safe and secure refuge for all such boats during the entire year. During the period antecedent to the filing of the petitions first hereinbefore mentioned, and so consolidated as aforesaid, the said premises were used for the storage of boats as aforesaid, and through the bridge then existing there was ample space for the passage of all boats entering to and from said Tenean Creek to the plaintiff's premises. By virtue of the authority vested in the defendant corporations by the decree of the said Superior Court, and the construction of the bridge therein contemplated, there would also be ample opportunity for said passage; but by the construction of a conduit such as is proposed by the said petition of the New York, New Haven, & Hartford Railroad Company (in which the Old Colony Railroad Company did not join) the passage of such boats would be rendered impossible, or largely impracticable, by reason of the fact that the convergence of the waters, in connection with the width and by reason of said conduit, and the said waters would ebb and flow upon the plaintiff's premises in such a way as to render them useless for the purpose of storing boats thereon and allowing the same to enter and depart from said premises, especially in respect to rowing, steering, or navigating said boats through said conduit; and said conduit, if at all, could only be used for said purposes during a very limited period of the tides."

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These allegations do not go to the extent of averring that by reason of the conduit tide water is excluded from the plaintiff's land, but simply that access thereto is impaired. The words "and the said waters would ebb and flow upon the plaintiff's premises in such a way as to render them useless for the purpose of storing boats thereon," upon which the plaintiff relies as an allegation of damage to a private right or of peculiar damage to him arising from a public nuisance, are, when taken in connection with their setting, altogether too vague and indefinite for that purpose. The act of which the plaintiff complains is a public nuisance and he alleges no such peculiar damage as will entitle him to maintain a private action. *Blackwell* v. *Old Colony Railroad*, 122 Mass. 1. *Robinson* v. *Brown*, 182 Mass. 266, and cases therein cited.

For a similar reason he was not entitled to be heard in the abolition proceedings and has no standing to enforce the abolition decree. *Selectmen of Norwood* v. *New York & New England Railroad*, 161 Mass. 259.

Decree affirmed.

BENJAMIN BARNETT *vs.* PHILIP ROSENBERG & others.

Suffolk. March 22, 1911. — June 22, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Equity Pleading and Practice, Master's report, Appeal, Evidence. *Evidence*, Of original bill in equity after substitution of amended bill. *Frauds*, *Statute of*. *Novation*.

A motion in a suit in equity to recommit a master's report in order that he may report the evidence is addressed to the discretion of the judge who hears the case, and ordinarily will not be granted by him in the absence of a special reason for doing so. An appeal from the denial of such a motion only can be sustained where it is shown that the judge in denying the motion exercised his discretion improperly.

Exceptions to a master's report relating to the admission or exclusion by the master of certain questions addressed to witnesses before him here were overruled as matters within the master's discretion.

In a suit in equity in which an amended bill had been filed by the plaintiff, which afterwards was further amended, the defendant excepted to a ruling of the master to whom the case was referred excluding from the evidence the plaintiff's original bill before amendment, which, with the jurat attached, was offered by

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the defendant "as bearing upon the genuineness of the plaintiff's claim." The case was tried on the amended bill and no copy of the original bill was in the record which came to this court by appeal, nor was there any statement of its contents, and it did not appear in what way it was contradictory either to the claim as alleged in the amended bill or to the testimony of the plaintiff. *Held*, that the exception was too indefinite to be sustained, and that it also must be overruled on the ground that the record did not show that the exclusion of the original bill by the master might or could have harmed the defendant.

The provision of the statute of frauds contained in R. L. c. 74, § 1, cl. 2, requiring a memorandum in writing to prove a promise to answer for the debt of another, does not apply where there was a novation by which the promise of the defendant was accepted by the plaintiff in substitution for the promise of the original debtor and in consideration of it the plaintiff released the original debtor and looked only to the defendant for payment.

BILL IN EQUITY, filed in the Superior Court, as amended, on March 25, 1908, and further amended on February 28, 1910, to reach and apply certain equitable assets, alleged to be in the hands of the other defendants, to the payment of $1,200 with interest from October 28, 1907, alleged to be due to the plaintiff from the principal defendant Philip Rosenberg.

The case was referred to Edwin N. Hill, Esquire, as master. He filed a report, and the case afterwards was heard by *Hardy*, J., who denied a motion of the defendants Philip Rosenberg and Israel Rosenberg to recommit the report with an order to the master to report the evidence taken before him, which is mentioned in the opinion, overruled the exceptions of the same defendants to the report, confirmed the master's report, and, in accordance therewith, made a final decree for the plaintiff. The defendants Philip Rosenberg and Israel Rosenberg appealed.

The defendants' exceptions to the master's report, referred to in the opinion, were for the reasons set forth in the following objections:

"1. Upon all the evidence in this case the plaintiff is not entitled to recover.

"2. The plaintiff had admittedly sworn falsely in stating that he had no other arrangement with Philip Rosenberg and others after April 15, 1907, in relation to the money due him for labor on houses on Hollander and Harold Streets.

"3. The master erred in excluding the bill of complaint previously filed or so much thereof as would show that the plaintiff had signed and sworn to a statement of his claim inconsistent with the allegations of the amended bills referred to the master.

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"4. The master erred in refusing to rule that, the agreement alleged of April 15, 1907, being not in writing, the plaintiff could not recover for money due him from Greenberg and Rosenberg, for work due prior to April 15, as being within the statute of frauds.

"5. The master erred in excluding the following questions put to the witness Samuel Rosenberg by the defendant's counsel, viz.: 'Whether or not you said to me to-day that Barnett wanted you to assist him in maintaining a lien on the Elmo Street property, although he knew he had lost it, and he knew that Green would cut him out unless you or Greenberg would help him.' This question was perfectly fair and competent and had a tendency to refresh the witness's recollection and the answer might have shown that part of the amount claimed was for work done on Elmo Street in which the defendant Philip Rosenberg had no interest.

"6. The master erred in permitting against the defendant's objections the following question put to the witness Gluntz, viz.: 'Were any of the other checks which were marked "Exchange" debited either to Mr. Cohen or to Mr. Rosenberg?'

"7. The master erred in excluding the question put to Philip Rosenberg, 'Whether or not before that time (July or August, 1907) you had become responsible to Mr. Barnett for anything,' the defendant claiming it to be a specific reply to some of the defendants' later testimony."

The eighth exception is described in the opinion. The thirty-sixth request for a ruling, referred to therein, was that the master rule "that on all the evidence the plaintiff cannot recover on this bill of complaint."

Upon the matter of the fourth exception, in which this court holds that a new contract between the defendant Philip Rosenberg and the plaintiff was substituted for the promise of Jacob Greenberg and Mary Rosenberg to pay the plaintiff for his work, so that the promise of the defendant Philip Rosenberg was to pay his own debt and not to answer for the debt of another within the meaning of R. L. c. 74, § 1, cl. 2, the master's report contained the following findings: "There was a conversation at this gathering between the plaintiff and the defendant upon the subject of the continuance and completion of the work

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still to be performed by the plaintiff, and I find that at this interview, and at another within a few days, on or about April 15, 1907, Philip Rosenberg informed the plaintiff that he had an interest in the houses on Hollander Street and Harold Street, and stated to the plaintiff that he wished to have the work go on and finished, and no steps to enforce liens, that he wanted him to work for him, and was not to look to Greenberg and Rosenberg any longer, that he wished to finish one of the houses for one Cohen, and that Barnett [the plaintiff] would be sure of getting his money for all that he did, and referred the plaintiff to Shapiro, who had the construction mortgages on these houses as to his responsibility and interest in the property. The plaintiff exhibited his books so far as they related to this contract to the defendant, and together they went over the books of the plaintiff to ascertain the exact amount due for the work already done and necessary to complete the contract on the houses and verified and agreed upon the amount to be as stated by Barnett, namely, the sum of $2,050. The plaintiff conferred with Shapiro in pursuance of the reference to him and was informed among other things, that Rosenberg was a mortgagee under two mortgages and was 'good for the money.' As a result of the interviews with Rosenberg and Shapiro I find as a fact that Barnett resumed his work, relinquishing his rights for liens, giving credit thereafter to Philip Rosenberg, who agreed to pay the entire sum above mentioned."

M. Fischacher, for the defendants Philip and Israel Rosenberg.

E. C. Stone, (*J. Michelman* with him,) for the plaintiff.

HAMMOND, J. This case is before us upon the defendants' appeal from the order denying the motion to recommit the report to the master in order that he may report the evidence, from the order overruling the defendants' exceptions to the master's report and from the final decree.

A motion to recommit is addressed to the discretion of the court, and ordinarily will not be granted in the absence of a special reason for it. *Henderson* v. *Foster*, 182 Mass. 447. Nothing appears in the present case to show that the judge improperly exercised his discretion in denying the motion.

Eight exceptions were taken to the master's report. They will be considered in their logical rather than their numerical

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order. The third, fifth, sixth and seventh exceptions relate solely to questions of evidence and are overruled. The fifth, sixth and seventh concern matters within the discretion of the master, and no error is shown in his action in this respect. The third exception relates to the exclusion of the original bill of complaint which with the jurat attached was offered by the defendant "as bearing upon the genuineness of the plaintiff's claim" and also as contradictory to his testimony. It was excluded. The original bill is not before us, and having been superseded by the final bill of complaint upon which alone the case was tried although among the files, its office as a part of the pleadings is defunct. There is no copy of it in the record before us, nor any statement of its contents, nor does it appear in what way it was contradictory either to the claim made on the amended bill or to the testimony of the plaintiff. For aught that appears it may have been excluded by the master upon the ground that the variances and contradictions were so far immaterial upon the real questions before him as to render him no assistance. But, however that may be, the exception is too indefinite, and we are of opinion that it does not appear that the defendants might or could have been harmed by its exclusion.

The eighth exception concerns the "statements, rulings, refusals to rule and refusals to report evidence and findings" contained in the report of the master under the head of "Defendants' requests of the master on various matters relating to the report in the foregoing case." There are thirty-six different requests set out under this heading. Some of them, like the fifth and ninth, call for portions of the evidence, and are properly refused on that account; some, like the first and fifteenth, ask for findings upon the evidence and cannot be considered by us because the evidence is not reported; some, like the third and seventeenth, are granted in part and in part refused; and in some, such as the second, the master has complied with the defendants' request. It is unnecessary to state in detail our conclusions upon these thirty-six requests. We have carefully examined them all, and as to all but the last, the thirty-sixth, which will be considered in connection with the first general exception, we find no error in law in the manner in which the master has dealt with them.

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The fourth general exception sets up the statute of frauds as to that part of the plaintiff's claim for work done for Greenberg and Rosenberg for which they owed him. But we think it sufficiently appears that there was a novation. This exception was therefore properly overruled. *Ellis* v. *Felt*, 206 Mass. 472, and cases cited.

The second exception deals with a matter of fact dependent upon the evidence and was properly refused.

Upon the facts found by the master the contract was upon a valuable consideration, was not within the statute of frauds, and the defendants have failed to pay the plaintiff in accordance with the terms of the contract. The first general request and the thirty-sixth request contained in the "statement" alluded to in the eighth general request were properly overruled. The orders denying the motion to recommit and overruling the exceptions to the master's report are affirmed, as is also the final decree.

So ordered.

BERNARD F. GATELY, trustee, *vs.* SARAH KAPPLER.
SAME *vs.* SAME.

Middlesex. March 22, 1911. — June 22, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Equity Jurisdiction, To set aside conveyance fraudulent as against creditors. *Fraud. Husband and Wife.*

A conveyance and transfer of property by a husband through an intermediary to his wife is not shown to be in fraud of subsequent creditors simply by proof that the conveyance and transfer were made with a design to settle the property upon the wife so that it should not be exposed to the hazards of the husband's future business or liable for any future debts that he might contract. It is necessary to go further and to show that at the time of the conveyance the husband had an actual intent to contract debts and a purpose to avoid by the conveyance and transfer the payment of them. In a suit in equity by the trustee in bankruptcy of the estate of a husband against the wife of the bankrupt to set aside a conveyance and transfer, such a fraudulent purpose here was shown on the part of the husband of which the wife was cognizant and in which she participated.

In a suit in equity by the trustee in bankruptcy of the estate of a husband against the wife of the bankrupt to set aside conveyances of real and personal property from the husband through an intermediary to his wife on the ground that they

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were fraudulent as against future creditors, there was evidence which fully warranted, if it did not require, the general finding, which was made by a master, that the conveyances were in fraud of future creditors, and no special finding was made by the master which was inconsistent with this general finding. The master also found, on evidence not reported by him, that the defendant was fully cognizant of this fraudulent intent of her husband "and participated therein, and accepted the said conveyances with knowledge that they were made to hinder, delay and defraud his future creditors." *Held*, that, as both the grantor and the grantee participated in the fraud, the conveyances, whether voluntary or for a valuable consideration, were void as to creditors, and it therefore was unnecessary to consider what, if any, equitable interest the wife had in the real estate before the conveyances, because she could take nothing by the conveyances and must be relegated to such rights as she had before they were made.

HAMMOND, J. These are two bills in equity brought by the trustee in bankruptcy of the individual and partnership estates of William T. True and Charles F. Kappler, to set aside as fraudulent certain conveyances made by the latter through an intermediary to the defendant, his wife, the first suit relating solely to real estate and the second solely to personal property. Each is before us upon the plaintiff's appeals from the order sustaining certain exceptions to the master's report, from the findings of the judge of the Superior Court and the order for a decree, and from the final decree dismissing the bill with costs.*

1. As to the first case. While the master has found that at the time of the conveyance of the real estate in June, 1906, there was no intention on the part of Charles F. Kappler or the defendant to hinder, delay or defraud his then existing creditors, he has made a different finding as to his future creditors. As to the latter his finding is that these conveyances from Kappler through Miss Hutchins to the defendant "were made by him with intent to hinder, delay and defraud his future creditors." This finding must stand unless shown to be wrong or inconsistent with some other finding by the master.

It is strongly insisted that the finding is not warranted by the subsidiary findings.

It is doubtless true, as contended by the defendant, that a finding of fraud as to subsequent creditors would not be warranted by the simple proof that the transfer was made with a design to settle the property upon the defendant so that it should

* The master was Frederic A. Fisher, Esquire. The findings, orders and decrees were made by *Harris*, J.

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not be exposed to the hazards of his future business or liable for any future debts which he might contract. *Winchester* v. *Charter*, 12 Allen, 606, 611. *Mowry* v. *Reed*, 187 Mass. 174, 177, and cases cited. It must further appear that at the time of the conveyance he had an actual intent to contract debts and a purpose to avoid by the conveyance the payment of them. *Stratton* v. *Edwards*, 174 Mass. 374, 378, and cases cited. *Winchester* v. *Charter*, *ubi supra*.

Some of the subsidiary findings are stated by the master as follows: "Upon all the evidence I find that on June 1, 1906, when Mr. Kappler conveyed all his real estate to the defendant as aforesaid, he knew or had good reason to believe and did believe that the contracts for building the houses in Hudson had already been awarded or would be awarded to the firm of True and Kappler; that the business of the firm would be conducted to a considerable extent on credit; that Mr. True did not stand in good credit with the lumber dealers in Lowell and was of little financial responsibility; and that any credit which might then or thereafter be extended to the firm by those with whom they had business dealings would in all probability be given upon the strength of his (Kappler's) being a member thereof. I further find that he intended that the Burnham and Davis Lumber Company and the Davis and Sargent Lumber Company should, and expected they would, extend credit to a considerable amount to the firm upon the strength of his representations made as hereinbefore set forth as to his financial ability, and in reliance upon their knowledge of and reasonable belief as to his ownership of property and financial standing from former dealings with him; that he intended that credit should, and expected that it would be given the firm by those with whom they had dealings upon the strength of his supposed ownership of property, and more particularly of real estate; that he intended and expected to contract debts as a member of the firm which he had good reason to believe in consequence of his conveyances of real estate to the defendant he might be unable to pay; and that in making said conveyances to the defendant he intended to put all his real estate out of the reach of his future creditors."

The master further found as follows: "At some time during the latter part of February or early in March, 1906, Mr. Kappler

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met Mr. Abbott on the street in Lowell. There was evidence and I find that in substance the following conversation ensued. Mr. Abbott stated that his company did not care to extend any further credit to the True Company unless Mr. Kappler would go good for the bills. Mr. Kappler then said he would never go good for another dollar of the True Company, that he had already formed or intended to form a copartnership with Mr. True to date from March 1, 1906, and take over the business of the True Company, that he was to do the buying, pay the bills, and keep True 'on the jobs,' that he, Kappler, had always been and was at that time 'good,' that the bills would be paid and he was the one to pay them for he had the 'stuff' to pay with. It also appeared that in answer to the direct question of Mr. Kappler whether or not Mr. Abbott would be willing to trust him, the latter replied in so many words that he would be glad to do so for he knew that he, Kappler, had property. Subsequently, about the middle of March, 1906, Mr. Kappler met on the street in Lowell Richard W. Jewett who had general oversight of the books and outside collecting of the Burnham and Davis Lumber Company, and who had also known Mr. Kappler for about fifteen years. There was evidence and I find that in substance the following conversation ensued. Mr. Jewett stated that the managing officials of the Burnham and Davis Lumber Company had been expecting Mr. True and Mr. Kappler to call at their office, that they wished to find out when the copartnership began. Mr. Kappler said it began on March 1, and on being questioned by Mr. Jewett as to the part he, Kappler, was to take in the business of the firm, Mr. Kappler stated that he was going to do all the 'ordering,' all the paying of bills and general 'outside hustling,' and keep True 'on the job.' In reply to a direct question whether he would be responsible for lumber ordered by Mr. True, Kappler said 'Yes, to a limited amount.' During this interview Mr. Kappler stated that he — meaning himself — was 'good' and had the 'stuff' to pay with, and further that the firm had some small contracts or jobs on hand but none of any importance."

Other findings by the master are as follows: "Between the time of his first trip to Hudson on or about May 20 and June 1, 1906, Mr. Kappler called at the office of the Davis and Sargent

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Lumber Company, a corporation for many years engaged in the lumber business in Lowell, where he met Frederick S. Conant, a salesman. There was evidence and I find that Mr. Kappler then said in substance to Mr. Conant that he was figuring on contracts for the construction of twenty houses in Hudson, Massachusetts, and inquired if the Davis and Sargent Lumber Company would like to submit prices for lumber. Mr. Conant then stated that the company would give no credit at all to Mr. True if he was to have anything to do with the matter, that he recognized Mr. Kappler as a former customer of the Howe Lumber Company with which Mr. Conant was previously connected, and that he recalled the fact that Mr. Kappler was 'perfectly good' then and was given credit. Mr. Kappler replied in substance that he was still 'perfectly good.' During this conversation Mr. Conant asked Mr. Kappler who was going to pay the bills for the lumber for which he was seeking prices, and Mr. Kappler replied that he would look out and pay the bills himself. At the close of this interview he was informed by Mr. Conant that he would be very glad to let him have all the lumber he wanted."

He further finds that "Although the firm of True and Kappler was formed some time in March, 1906, it did not appear upon the evidence that they actually commenced any building operations or incurred any liabilities prior to making the contract for the construction of the O'Neil houses in Hudson," and he also finds that "The debts of the firm of True and Kappler, all of which were incurred subsequent to June 1, 1906, amounted on April 8, 1907, the date of the adjudication in bankruptcy, to about $13,000, and the individual indebtedness of Mr. Kappler to about $1,245. The Burnham and Davis Lumber Company was a creditor of the firm of True and Kappler at the time of the adjudication in bankruptcy in the sum of $2,669, being the balance for lumber and building materials sold and delivered to the firm after June 1, 1906, and the Davis and Sargent Lumber Company was a creditor of said firm at the same time for lumber and building materials sold and delivered after June 1, 1906, for use in the construction of the O'Neil houses to the amount of $5,200. I find that the managing officials of these two lumber companies gave credit to the firm of True and Kappler in reliance upon the statements made to them by Mr. Kappler, as hereinbefore set

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forth, in February or March, 1906, and also in reliance upon their knowledge of and reasonable belief as to his ownership of property and financial standing derived from their previous dealings with him and upon their belief that there had been no material change in his holdings of property or in his financial condition. There was direct evidence that Mr. Abbott, the president of the Burnham and Davis Lumber Company, had no actual knowledge of the said conveyances of real estate from Mr. Kappler to the defendant until some time in September, 1906, after all the indebtedness of the firm to his company had been incurred. I also find that credit was given by each of these two lumber companies without any actual knowledge on the part of their managing officials of the said conveyances of real estate from Mr. Kappler to the defendant, nor was there evidence that any of the creditors had notice of such conveyances other than the constructive notice resulting from the recording of the deeds."

These various findings, taken in connection with the undisputed facts, fully warrant, if they do not require, the general finding that these conveyances were in fraud of future creditors. Nor is it inconsistent with any special finding made by the master.

The master has found that the defendant was fully cognizant of this fraudulent intent of her husband "and participated therein and accepted the said conveyances with knowledge that they were made to hinder, delay and defraud his future creditors." The evidence upon which the master reached this conclusion is not before us, and therefore the finding must stand.

Both grantor and grantee having participated in the fraud, the conveyances, whether voluntary or for valuable consideration, were void as to creditors. *Wadsworth* v. *Williams*, 100 Mass. 126. See also *Bancroft* v. *Curtis*, 108 Mass. 47, 49. It therefore becomes unnecessary to consider what, if any, equitable interest the wife had in the land before the conveyances. She can take nothing by the conveyances but must be relegated to such rights as she had before.

Of the eleven exceptions filed by the defendant to the master's report the fifth, seventh, eighth and ninth are overruled by the Superior Court as being based wholly or in part upon evidence

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not reported, and, no appeal having been taken by the defendant, they are not before us; the first and second are overruled because they have become immaterial, and the third, fourth, sixth, tenth and eleventh, for reasons hereinbefore stated. The final decree is reversed. The exceptions to the master's report are overruled and the report is confirmed. There is to be a decree for the plaintiff declaring the conveyances void in accordance with this opinion.

In the second case, for similar reasons the same course should be taken with reference to the defendant's exceptions to the master's report, and the report itself and the final decree. There should be a decree for the plaintiff declaring the conveyance void in accordance with this opinion. In each case it is

So ordered.

J. F. Owens, (*M. G. Rogers* with him,) for the plaintiff.

S. S. Taft, (*J. P. Farley & E. J. Tierney* with him,) for the defendant.

ALBERT L. POPE & others, trustees, *vs.* ABBY POPE & others, executors.

Norfolk. March 23, 1911. — June 22, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Trust. Devise and Legacy. Husband and Wife. Equity Jurisdiction, Bill for instructions.

By the express provision of R. L. c. 141, § 24, beneficiaries under a trust created by will to whom gifts of annual income are made are entitled to such income from the death of the testator.

Under the statutes of this Commonwealth, if a widow does not waive the provisions of her husband's will, she loses the right of dower unless it plainly appears by the will that the testator intended such provisions to be in addition to dower, and, where a widow thus has lost her right of dower by not waiving the provisions of the will, the law regards her as standing in the position of a purchaser for a valuable consideration and entitled to receive the whole of the sums given to her by the will in preference to other legatees.

A testator, among other provisions for a son who was a minor when the will was made, provided as follows: "and upon my said son's arrival at the age of twenty-one, provided I am not then living, said trustees shall pay to him out of the principal of said trust fund the sum of five thousand dollars." When the son arrived at the age of twenty-one years the testator was living. The son

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survived his father. *Held*, that the legacy of $5,000 never became payable and never could become so.

In a suit in equity by the trustees under a will the plaintiffs asked for instructions as to whether, in payments to beneficiaries under the will to whom gifts of annual income were made, when there had been *pro rata* abatements on account of deficiency of income, the trustee should make up such deficiency in income occurring in one year from a surplus occurring in a subsequent year, and for further instructions as to the disposition of excess of income under the directions contained in the will. It was stated in the argument before this court that the income of the trust was insufficient to meet the demands upon it, and all the parties agreed that there was such insufficiency. *Held*, that, as the question of the disposition of surplus income was not before the trustees and might never be before them, there was no occasion for this court to consider it.

A testator in the residuary clause of his will established a trust which contained this provision for his children: "To each of my surviving children who shall be of age at the time of my decease, and to any child of mine who shall be a minor at the time of my decease when he shall attain his majority, an annually increasing income, the amount of which shall be dependent upon the age of such child, and shall be determined as follows, to wit: $3,000 a year at the age of twenty-one years, with an increase of $1,000 a year thereafter for ten years: For instance, a child who shall be twenty-one years old at the time of my decease will receive an income at the rate of $3,000 a year, at the age of twenty-two $4,000 a year, and so on, till at the age of thirty years a child would receive the maximum income, viz., $12,000 a year." Upon a bill by the trustee for instructions as to whether the increase of $1,000 a year should be continued for ten years after a child reached the age of twenty-one years, as directed in the first clause of the paragraph, making $13,000 a year in the thirty-first year of such child's age, or whether, as directed in the last clause of the paragraph, the maximum should be reached in the thirtieth year and should be $12,000 a year, it was *held*, that the first clause must yield to the last so far as it was inconsistent with it, making the maximum income $12,000 and thirty years the age beyond which there was to be no increase.

In a suit in equity by the trustees under a will, the plaintiffs sought instructions in regard to a payment directed to be made to one of the sons of the testator in the first preferred stock of a certain corporation "not later than his twenty-fourth birthday," asking, whether under the circumstances stated in another bill for instructions, which had been filed by the executors of the same will, this son was entitled to any payment of this legacy in stock or money, and, if so, whether he was entitled to receive it when he reached the age of twenty-three years or when he reached the age of twenty-four years. It was stated in the bill of the executors for instructions that the stock referred to was not in the hands of the trustees and was not obtainable in the market. *Held*, that it was not necessary to answer this question.

BILL IN EQUITY, filed in the Supreme Judicial Court on September 27, 1910, by the trustees under the will and codicil of Albert A. Pope, late of Cohasset, for instructions.

The bill alleged that Albert A. Pope, late of Cohasset, died on August 10, 1909, leaving a will and codicil, copies of which were annexed to the bill, that the will was executed on June 16,

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1905, at Boston and the codicil was executed on May 28, 1906, at Hartford, in the State of Connecticut; that the will and codicil were allowed by the Probate Court for the county of Norfolk on September 1, 1909; that the plaintiffs had been appointed trustees under the will and codicil, had qualified and still were acting as such trustees; that the defendants, Abby Pope, Albert L. Pope, Harold L. Pope, Edward W. Pope and Robert L. Winkley had been appointed executors of the will and codicil, had qualified and still were acting as such executors; that the testator left at the time of his death a widow, Abby Pope, and the following named children, all then of full age: Albert L. Pope, born July 14, 1872, Margaret Roberts Hinckley, wife of Freeman Hinckley, born May 29, 1876, Harold L. Pope, born November 5, 1879, and Ralph Linder Pope, born March 23, 1887; that the testator left surviving him, at the time of his death, the following grandchildren, each of whom was at the time of the filing of the bill under the age of twenty-one years: Margaret Pope Hinckley, born March 11, 1899, and Albert Pope Hinckley, born March 9, 1901, both being minor children of Freeman Hinckley of Boston, also Leonora Hinckley Pope, born November 1, 1901, Charles Linder Pope, born March 6, 1903, and Harold Linder Pope, Jr., born November 11, 1906, all three being minor children of Harold Linder Pope of Wilkes-Barre, Pennsylvania; that on or about August 19, 1907, after the testator had executed his will and codicil, by deed recorded with Norfolk Deeds on September 17, 1907, he gave and conveyed to his daughter, Margaret Roberts Hinckley, an estate for life, with remainder to her children, in a house and land appurtenant thereto in Cohasset of the value at the time of the gift of about $9,500 and of about the same value at the time of the testator's death; that the plaintiffs were in doubt in regard to their duties under the will and codicil, and therefore asked for instructions from the court upon the following questions:

"1. From what date are the *cestuis que trust*, to whom gifts of annual income are made, respectively entitled to such income?

"2. Is Abby Pope preferred as to income to the extent of $12,000 per year over all other persons interested in the distributive income of the trust?

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"3. Shall the trustees pay to the said Ralph Linder Pope, out of the principal of the trust fund, the sum of $5,000, referred to in clause (b) of the second article of the codicil, and if so, on what date did he become entitled to the payment of that amount?

"4. If the income of the trust estate, after having paid all administrative expenses, is insufficient to make all the payments which the testator provided in his codicil should be made from such income, in what order shall the trustees make payments to the beneficiaries and from what gifts of income must abatement be made?

"5. Are the rights of the *cestuis que trust* to whom gifts of annual income are made cumulative; that is, should the trustees make up for a deficiency of income occurring in one year from a surplus occurring in a subsequent year?

"6. Under the provisions of clause (f) of the second article of the testator's codicil, which revoked article eighth of the will and substituted therefor a new article eighth, to what amount of income is each of the testator's children entitled, and what is the maximum payment of annual income to which each child will become entitled, if he or she survives, and at what time in the future will such maximum payment of annual income be payable, whether when each child attains the age of thirty years or when each child attains the age of thirty-one years?

"7. In case of an excess of income, as provided in said clause (f) of the codicil, have the trustees the right or the duty, under the provisions of the paragraph marked 1st in said clause (f) to build or purchase a residence for the defendant, Margaret Roberts Hinckley, either of a value not exceeding $20,000 or of a value not exceeding $20,000 less the value of the Cohasset life estate given her by the testator, and is it the trustees' right or duty so to build or purchase a suitable residence for the defendant, Margaret Roberts Hinckley, before building or purchasing a suitable residence for the defendant, Harold L. Pope, under the provisions of paragraph marked 2nd in said clause (f) of the codicil?

"8. Is the excess of income referred to in said clause (f) an excess over and above the annuities provided for in clause (f) and preceding clauses, or is it an excess over and above all the

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annuities provided for in Article Second of the testator's codicil, including clause (g)?

"9. Under the provisions of clause (h) of said second paragraph, is Ralph Linder Pope entitled to receive any payment in stock or money at any time in view of the facts set forth in the bill for instructions of the executors of the will of Albert A. Pope, filed in this court September 16, 1910;* if so, is the said Ralph Linder Pope entitled to receive such payment when he attains the age of twenty-three years or when he attains the age of twenty-four years?"

The residuary clause of the testator's will was Article Eighth. Article Second of the codicil substituted a new Article Eighth, which, so far as is material, was as follows:

"Second. I hereby revoke and annul so much of 'Article Eighth' of my said will and the gifts and devises therein contained as are inconsistent with the following clause and gifts and devises which are to be substituted for and to take the place of said Article Eighth, which is henceforth to read and provide as follows:

"Eighth. I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of whatever name and nature and wherever situated (including all lapsed legacies and devises, if any) to my son, Albert L. Pope, my son, Harold L. Pope, and my two friends, Robert L. Winkley, of West Hartford, and Charles E. Gross, of Hartford, in the State of Connecticut, but in trust nevertheless for the following purposes, to wit: To hold, manage, invest and reinvest the same as in their judgment and discretion they may deem best for the interests of the trust estate; to collect and receive the income thereof, and to divide and pay over out of the annual net income of said trust estate as hereinafter set forth, to wit:

"(a) To my wife, Abby Pope, if she survives me, twelve thousand dollars ($12,000) a year during her life;

"(b) To the guardian of my minor son, Ralph Linder Pope, if he survives me, such sums as may be required for his support and education until he arrives at the age of twenty-one (21) years, not exceeding, however, the sum of two thousand dollars ($2,000) in any one year, and upon my said son's arrival at the

* See *Pope* v. *Hinckley*, *ante*, 323.

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age of twenty-one years, provided I am not then living, said trustees shall pay to him out of the principal of said trust fund the sum of five thousand dollars."

"(f) [The first paragraph of this subdivision is quoted in full in the opinion.]

"Should the income of the trust estate in any year not warrant the full increase in payment herein provided for, or should such income be insufficient to maintain the rate of payments hereinbefore made, said income shall be divided among my children in proportion to the payments made to them during the year next preceding, but any deficiency in increase in income in any one year shall be thereafter made up and paid by the said trustees whenever the condition of the trust estate will warrant it, it being the purpose and intent of this will that the increasing income herein provided for shall be cumulative. If, however, my said trust estate shall at any period during the existence of the trust be out of debt and earning a net income more than sufficient to pay the annuities herein provided for, the said trustees shall first apply the excess of income over and above said annuities as follows:

"1st. In case my daughter, Margaret Roberts, wife of Mr. Freeman Hinckley, of Boston, shall survive me and be living at the settlement of my estate by my executors and at the time of the receipt of said trust estate by said trustees, I desire and direct my said trustees and the survivors of them to build or purchase and acquire a suitable residence for my said daughter either in said Boston or in such other place as she, with the approval of my said trustees, may select, at an expenditure, however, not to exceed the sum of twenty thousand dollars, and said trustees are authorized and directed to pay therefor, but not exceeding said sum of twenty thousand dollars, out of the excess of income of said trust fund, and thereupon said trustees shall convey said residence to my said daughter, for life, and subject to said life estate, to her children absolutely, in fee, said children to share equally.

"2nd. In case my son, Harold L. Pope, shall survive me and be living at the settlement of my estate by my executors and at the time of the receipt of said trust estate by said trustees, I desire and direct my said trustees and the survivors of them to

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build or purchase and acquire a suitable residence for my said son either in said Boston or in such other place as he, with the approval of my said trustees, may select, at an expenditure, however, not to exceed the sum of twenty thousand dollars, and said trustees are authorized and directed to pay therefor, but not exceeding said sum of twenty thousand dollars, out of the excess of income of said trust fund, and thereupon said trustees shall convey said residence to my said son Harold for life, and subject to said life estate, to his children absolutely, in fee, said children to share equally.

"3rd. Said trustees may also divide one-half of any remaining excess of said income among my wife and children *pro rata* in proportion to the incomes they are receiving at that particular time."

"(h) Thirty days after my said son, Ralph Linder Pope, graduates from college, and in any event not later than his twenty-fourth (24th) birthday, I direct my said trustees to pay over to him one hundred (100) shares of the aforesaid first preferred stock of the said Pope Manufacturing Company."

The case came on to be heard upon the bill, answers and agreed facts before *Hammond*, J., who reserved it for determination by the full court.

M. F. Dickinson, for the trustees, stated the case.

J. B. Warner, (*P. L. Stackpole* with him,) for Albert L. Pope and others, children of the testator.

H. E. Warner, for Abby Pope.

N. N. Jones, for Adelaide L. Pope and others.

H. R. Bailey, guardian *ad litem* for children of Harold Linder Pope and unborn issue of all the testator's children.

HAMMOND, J. 1. There can be no doubt that *cestuis que trust* to whom gifts of annual income are made are entitled to such income from the death of the testator. R. L. c. 141, § 24. Indeed nobody at the argument before us contended, nor does it appear by the pleadings or otherwise that any of the parties interested ever contended, to the contrary.

2. "A wife cannot be deprived of her dower except by her own consent. Therefore, when she accepts a provision in her husband's will as a substitute for this existing legal right, the law regards her as standing in the light of a purchaser for a valuable consideration, and entitled to receive the whole of the

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sum given by the will . . . in preference to other legatees, who, being only objects of the bounty of the testator, and not having any legal claim on his estate, are regarded as volunteers, and are not allowed to take until the widow has received the full amount of the bequest to her." Bigelow, C. J., in *Pollard* v. *Pollard*, 1 Allen, 490, 491. In that case the will expressly stated that the bequest was in lieu of dower. But the same principle is applicable where the widow loses her dower by not waiving the provisions of the will, even though the will does not specifically provide that the gift is in lieu of dower. Under our statutes, if the widow does not waive the provisions of the will she loses her right of dower unless it plainly appears by the will that the testator intended such provisions in addition to dower. If she foregoes the right to dower, therefore, she takes the legacy in the character of a purchaser for valuable consideration and is entitled to a preference. *Towle* v. *Swasey*, 106 Mass. 100. *Richardson* v. *Hall*, 124 Mass. 228, 234. *Borden* v. *Jenks*, 140 Mass. 562. It is suggested by the guardian *ad litem* of certain persons interested that the other provisions in the body of the will may well be taken as equivalent to a reasonable provision in lieu of dower. But that position is untenable. There is nothing in the will to show that any one bequest was intended to be in lieu of dower rather than another. Moreover, as said by Devens, J., in *Borden* v. *Jenks*, *ubi supra* (p. 564), "Whether the provision be more or less, so far as the testator, the widow, and all pure beneficiaries under the will are concerned, it is the right of the testator to affix what consideration he pleases for the relinquishment of dower, and for the widow to accept or reject it." The second question must be answered in the affirmative.

3. The third question must be answered in the negative. The condition upon which the $5,000 was to be paid to Ralph Linder Pope upon his arriving at twenty-one years of age was that the testator should not then be living. When Ralph arrived at that age the testator was living. The legacy never became payable nor can it ever be.

4. "If the income of the trust estate, after having paid all administrative expenses, is insufficient to make all the payments which the testator provided in his codicil should be made from such income," then the legacy to the widow, for reasons herein-

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before stated, is preferred and is entitled to be paid in full, and the other legacies are to be abated *pro rata*. No direction as to the legacy for the education and support of Ralph Linder Pope while a minor arises because, as before stated, he was twenty-one years of age before the testator died.

5. Although the record does not show that the income of the trust fund is insufficient to meet the demands upon it, yet it was stated at the argument and all parties agreed that there was such insufficiency. The fifth question is not therefore before the trustees and may never be before them. For this reason we have no occasion to consider it.

6. The sixth question calls for an interpretation of the following paragraph (f) in the substitute for Article Eighth of the will contained in Article Second of the codicil. "To each of my surviving children who shall be of age at the time of my decease, and to any child of mine who shall be a minor at the time of my decease when he shall attain his majority, an annually increasing income, the amount of which shall be dependent upon the age of such child, and shall be determined as follows, to wit: three thousand dollars ($3,000) a year at the age of twenty-one years, with an increase of one thousand dollars ($1,000) a year thereafter for ten (10) years: For instance, a child who shall be twenty-one (21) years old at the time of my decease will receive an income at the rate of three thousand dollars ($3,000) a year, at the age of twenty-two (22) four thousand dollars ($4,000) a year, and so on, till at the age of thirty (30) years a child would receive the maximum income, viz., twelve thousand dollars (12,000) a year."

What does this paragraph mean? It is argued on the one hand that the clause expressly says that the legatee at twenty-one years of age shall have $3,000 a year with an increase of $1,000 a year thereafter for ten years, and that the only possible meaning of this is that to the $3,000 is to be added $1,000 ten times, and hence the maximum is $13,000, and that the ten years does not expire until the thirty-first birthday is reached, and that this plain meaning of the language is to stand notwithstanding the subsequent language in which it is contended that the testator made an arithmetical mistake. It is argued on the other hand that the illustration shows the maximum limit which the

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testator intended to fix to the legacy, namely, $12,000, and that the time for stopping the increase would be upon the thirtieth birthday and that the mistake, if any, is in the first clause and not in the second.

It is plain that there is a blunder somewhere. The clauses are irreconcilable if each is to be literally interpreted as it reads. Which shall yield? It is to be noted that this is not a case where the inconsistent clauses are independent statements having no relation to each other. On the contrary it is a case where the second clause is explanatory of the first, or in other words the second clause is the testator's own statement of what he means by the first. In that explanation of his meaning he describes $12,000 as the maximum limit of the bequest and thirty years as the age at which the increase shall stop. In the first clause he expressly states the minimum, in the second he expressly states the maximum; in the first the age at which the legacy shall begin, in the second that at which the increase shall stop. The second clause states in the testator's own language the result he supposed he had reached by the first, and evidently the result he intended to reach, while the first clause describes the manner of reaching it. It seems to us more probable that the inconsistency is due rather to an inaccuracy in stating the details of the method of reaching the result than in the express statement of the result itself. The rule of interpretation is somewhat analogous to that which is applied in the matter of description of land, where distance and direction must yield to monuments. The result is that the first clause so far as inconsistent with the second must yield. The maximum is $12,000 and thirty is the age beyond which there is no increase.

7. There being no excess of income there is no occasion to consider either the seventh or eighth questions.

8. It appearing by reference to the facts stated in the bill of the executors for instructions, which by the terms of the report may so far as material be regarded as a part of this case, that the stock referred to in the ninth question is not in the hands of the trustees nor obtainable in the market, this question is not answered.

There is to be a decree in accordance with the terms of this opinion, and it is

So ordered.

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CROSBY A. HINDS *vs.* EMMA I. STEERE.

Suffolk. March 24, 1911. — June 22, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Carrier, Of passengers. *Automobile. Negligence.*

The proprietor of a sight-seeing automobile, designed to carry about twenty-five persons, who has a regular stand from which the vehicle starts on regular trips over regular routes at stated hours, for which tickets are placed for sale at various hotels at a stated price for each trip, while he is transporting on such sight-seeing trips persons who have purchased tickets thus offered for sale, is bound to exercise toward his passengers the highest degree of care consistent with the proper transaction of the business, whether or not he technically is a common carrier of passengers.

HAMMOND, J. This was an action of tort for personal injuries suffered by the plaintiff in a collision on the highway between a "sight seeing automobile" owned by the defendant, in which the plaintiff was riding as a passenger, and an electric car operated by the Boston Elevated Railway Company. The plaintiff brought an action also against the railway company. The two actions were tried together before a jury and in each a verdict was rendered for the plaintiff.

Upon the question of the care required of the defendant the judge* charged as follows: "With reference to the chauffeur of the automobile, the care is a little different than it is with reference to the motorman of the car. I have said to you before that a common carrier has to exercise a high degree of care with reference to passengers, and in this case the chauffeur was exercising the care — should have exercised a care with reference to passengers, because these two plaintiffs were passengers on his vehicle, and for the purposes of this case, he should have exercised the high degree of care with reference to their safety, and where the care was with reference to a collision, where the danger and the damage might be very great, it is a degree of care in view of the danger, and of the injury that might be caused by any want of care. Now,

* *Bond,* J. After his death the defendant's exceptions were allowed by *Pierce, J.*

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if he did not exercise that high degree of care, then, so far as Mr. Hinds's case is concerned, you will find for the plaintiff against the owner of the automobile, Mrs. Steere. If he did exercise the high degree of care, then you will find for the defendant in the case against her."

To this part of the charge the defendant excepted, and the case is before us on this exception. The contention of the defendant is expressed in her brief as follows: "In that portion of the charge to the jury excepted to by the defendant, the presiding judge instructed the jury that the driver of the automobile was obliged to exercise the high degree of care required of a common carrier with reference to passengers and that if the jury found that the driver of the automobile did not exercise that high degree of care required of a common carrier of passengers, they should find for the plaintiff; or in other words, that the owner of the automobile was a common carrier of passengers. The defendant contends that she was not a common carrier of passengers within the legal meaning of that term, but was a private carrier only."

It appeared that the automobile was a five ton truck about twenty-five feet in length and ten feet in width; that there were six seats running crosswise, holding from four to five people each, the whole automobile being designed to carry about twenty-five persons; that the motive power was electricity; that through the spring and summer and early fall of 1907 preceding the accident, which took place on September 26, 1907, the automobile had a regular stand or starting place on Dartmouth Street opposite the Public Library in the city of Boston; that from this stand or starting place the automobile usually made three trips daily on pleasant days, taking persons at a stated price for each trip, the general routes of these trips being announced to prospective patrons; that tickets were sold by the chauffeur in the employ of the defendant Steere, and also, at different hotels in the city of Boston, one of which was the Hotel Bellevue, the tickets at that hotel being sold at the newspaper stand; that in pleasant weather the automobile, from the stand on Dartmouth Street, usually made a trip at a given hour in the morning over a certain general route, covering points of interest in Boston; a second trip at two in the afternoon over another general route, covering various points of interest in

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Cambridge; and a third trip at four in the afternoon over another general route, through the Back Bay and the Fens in Boston; and that other and different trips sometimes were made; that the plaintiff on the day of the accident had purchased tickets for himself and his wife for the trip to Cambridge, and on the return of the automobile from that trip decided to remain on it for the trip to the Back Bay and the Fens; that he therefore paid his fare for his wife and himself for this trip and was riding on the automobile, as a passenger, at the time of the accident, which occurred about 5.30 P. M. on the return of the automobile from this trip. It further appeared that these trips were sight seeing trips, and it did not appear that the automobile made any stops on any of its trips.

It thus appears that the business in which the defendant was engaged was that of carrying passengers for hire; that she had been engaged in it constantly for several months; that she had a regular stand from which the automobile started and regular routes over which it ran; that by placing the tickets for sale at different hotels she publicly advertised this business and she must be held to have contracted to carry any person who should present himself with a ticket, provided there was no valid objection. The fact, that no stops were made on the way and that the passengers were led by motives of pleasure, curiosity or a desire for information on matters connected with the local, State or national history rather than by any private business exigency or convenience, is of no consequence. The automobile was large, carried many passengers and was wholly within the control of the driver.

It is apparent that this business much more resembled a public than a private carriage of passengers, and, whether in a strictly technical sense the defendant could be regarded as a common carrier of passengers or not, we are of opinion that she was bound to use reasonable care according to the nature of the contract, and that in view of the nature of the business and the peril to life and limb of the passengers likely to arise from an accident, this reasonable care should be defined as the highest degree of care consistent with the proper transaction of the business. See the discussion of reasonable care by Sheldon, J., in *Gardner* v. *Boston Elevated Railway*, 204 Mass. 213, 216, and cases cited; also *Galligan* v. *Old Colony Street Railway*,

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182 Mass. 211, and *Warren* v. *Fitchburg Railroad*, 8 Allen, 227, 233. The language of the presiding judge was sufficiently favorable to the defendant.

Exceptions overruled.

D. T. Montague, (*M. E. Sturtevant* with him,) for the defendant.

H. W. Dunn, for the plaintiff.

WILLIAM B. JOHNSON *vs.* NORCROSS BROTHERS COMPANY.

Suffolk. March 29, 1911. — June 22, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, In writing. *Evidence*, Extrinsic affecting writings. *Custom.*

At the trial of an action by a plumber and piper against a general contractor upon a contract in writing, by which the plaintiff agreed to furnish all the work of "plumbing, gas-piping, and ice water plant piping" in a certain building then being constructed by the defendant for the owner, it appeared that the contract contained a plain provision that the defendant should not be held to pay anything for changes, additions or extra work unless such work was ordered by the defendant in writing. The work for which the plaintiff sought compensation was extra work for which no order in writing ever was given by the defendant. The plaintiff offered to show a general custom, known to the parties, that in cases of contracts between a sub-contractor and a general contractor, which contained such a provision, it was customary for the general contractor to direct the sub-contractor to proceed with extra work without waiting for a written order, for the sub-contractor so to proceed and for the written order to be delivered by the general contractor later, either during the progress of the extra work or after its completion, and that the plaintiff had proceeded with the extra work in question without waiting for written orders, relying upon this general custom. There was no evidence of an oral order for the extra work having been given by the defendant or in his behalf. The judge excluded the evidence. *Held*, that the evidence was excluded rightly; both because there was no evidence of an oral order by the defendant or some one authorized by him for the extra work, and because the natural meaning of the provision of the contract was that the written order to do the work should be given before the work was begun, and the evidence therefore was rejected properly as an attempt to vary the express language of the contract; and also because, even if it should be assumed that the alleged custom was not inconsistent with the contract and that the plaintiff relied upon it, he relied upon it at his peril and took the risk of no order in writing being given later, and in the present case no order in writing ever was given.

HAMMOND, J. This was an action upon a written contract by which the plaintiff, the party of the second part, agreed with

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the defendant, the party of the first part, to provide all the materials and do all the work of "plumbing, gas-piping, and ice water plant piping" in a certain building, then being erected by the defendant for the owner, as set forth and explained in certain drawings and specifications prepared by the architects. The case was sent to an auditor * who found for the plaintiff on the first, sixth and seventh items of the account and for the defendant upon the others. It was then tried before a judge † sitting without a jury, who found "upon all the evidence that the auditor's report has not been overruled," and that the findings of the auditor were sustained. The case is before us upon the plaintiff's exceptions to the exclusion of certain evidence and to refusals to rule as requested.

Among the provisions of the contract were the following: "In case any particular shall be deficient, or not clearly expressed in said specifications and drawings, the said party of the second part will apply to the said first party for additional drawings and explanations, and will carry out the general design, as directed by the said first party, in a thorough manner as part of the contract. . . . It shall be lawful for said party of the first part at all times to direct, in writing, any additions to or deviations from the drawings and specifications aforesaid, without in any other respect or particular varying this agreement or impairing the force thereof; and in case of any such addition or deviation so directed in writing, such further time shall be allowed for the completion of said work as the architect shall decide to be reasonable, and such sums of money shall be added to or subtracted from the amount of the consideration hereinafter agreed to be paid, as the increase or diminution in the amount of work and materials thereby occasioned shall be fairly worth. And it is expressly agreed that no alterations or additions are to be paid for unless so directed in writing." And near the end of the contract is the general provision that "the general contractor [the Norcross Brothers Company] will pay for no extra work or material unless ordered in writing."

The purpose of the provision that the defendant shall not be held to pay anything either for changes, additions or other extra

* Samuel C. Bennett, Esquire.

† *Hardy*, J.

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work unless ordered in writing is plain. The provision manifestly was intended to prevent any future controversy likely to arise as to the liability of the general contractor for work so done, and it is a useful and reasonable provision.

The evidence offered * to show a general custom known to the parties was rightly rejected. The natural meaning of the language of the contract is that the written order to do the work is to be given before the work begins, and that only such an order is intended. If that be the meaning of the contract, then the evidence was properly rejected as inconsistent with its express language. But however that may be, the evidence so far as it was inconsistent with the contract was not admissible, and so far as, being consistent with the contract, it bore upon the question of the time when the written order should be given, it was immaterial in this case because no such written order ever was given. If it be urged that in reliance upon this custom the plaintiff went ahead without the written order, expecting to get that at some time afterward, the answer is that he did so at his peril. To say that because he did so he therefore should recover without the written order, the defendant not having waived the provision or having been guilty of fraud, is to annul the provision for the order. If there be such a custom as the plaintiff offered to show, then the provision of the contract read in the light of that custom would be interpreted to mean that for changes and alterations and extras there was to be no pay unless some time

* The plaintiff's offer was as follows:

(a) "I offer to show that this clause providing that no additions or alterations shall be paid for unless ordered in writing is common in contracts of this character between general contractors and sub-contractors, not only in case of the defendant's contracts but those of other general contractors; that during the progress of the work, when an addition or alteration is decided upon, it is the general custom, which was known to both plaintiff and the defendant, irrespective of this clause, for the general contractor to direct the sub-contractor to proceed without waiting for a written order and for the sub-contractor so to proceed, and for the written order to be delivered by the general contractor later, either during the progress of the extra work or after its completion; that it would be practically suicidal for the business of the sub-contractor with the large general contractors, if he refused to go forward under such circumstances without waiting for the written order, and that the plaintiff, as regards the items in suit, proceeded with the work without waiting for written orders, in reliance upon this general custom."

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before the work was fully done, or after its completion, a written order was given, but it would not show that the written order was not to be given at all. Moreover, it would be immaterial when, as in this case, it is not shown that any oral order was given by the defendant or by any one for whom it was responsible.

The plaintiff made twenty-eight requests for findings of fact. As to these the trial judge says in his memorandum that "so far as the plaintiff's requests for findings of fact are consistent with the findings of the auditor in his report I give them. So far as they are inconsistent therewith I deny them." In other words the judge, giving due weight to the report of the auditor and to the other evidence, came to the conclusion that the auditor was right in his findings and adopted them. It cannot be said that in this there was any error in law. The evidence being conflicting, his decision could not be said to be wrong in law. Nor do we understand that the plaintiff has taken any exceptions to this action of the judge.

The plaintiff submitted seventeen rulings, some of which were given and some refused, the latter being those numbered one, five, eight, ten, and twelve to seventeen, both inclusive.* The fifth was properly refused. It would hold the defendant to pay for work though it did not order the work or in any way agree to pay for it. The eighth seems to involve the assumption, contrary to fact, that the specifications gave a line for the main drain. Even if such a line had been given and afterwards was varied by the architects to an unreasonable extent, the defendant, having nothing to do with it, would not be chargeable with the cost. The parties had expressly agreed that the changes which the architect could order should be those which would not increase the cost. This request was properly refused. The tenth request was rendered immaterial by the findings of the auditor affirmed by the court. There was no finding of an agreement between the plaintiff and the architect's representative and the defendant. Moreover in giving the eleventh request the judge gave all of the

* It is unnecessary to quote these requests for rulings, which, for the purpose of understanding the decision, are described sufficiently in the opinion. Coburn, mentioned in the twelfth request, was the defendant's superintendent of construction.

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or forty feet and saw no car. This was evidence of some care. Nor is this a case where the conclusion from known facts is irresistible, no matter what the oral testifying may be, either that the plaintiff failed to look at all or looked negligently under circumstances where reasonable care demanded observation. There was testimony that the on-coming car was going at the rate of twenty-five miles an hour. If so, it might have covered the distance of forty feet in the time required by the plaintiff to go from the place where he looked to the point where he was struck. Hence it may have been found that he did look a distance of forty feet up the track without seeing the car. Therefore the principle of cases like *Fitzgerald* v. *Boston Elevated Railway*, 194 Mass. 242, and *Haynes* v. *Boston Elevated Railway*, 204 Mass. 249, is not applicable. There was evidence that the plaintiff was following in the steps of another man walking four feet in front, who gave no indication by his manner or voice that a car was approaching. The conduct of others travelling in company under similar conditions has been held often to be material as bearing upon the due care of children (*Beale* v. *Old Colony Street Railway*, 196 Mass. 119, 124, and cases cited), and, while of less weight in the case of adults, is entitled to consideration. *Plummer* v. *Boston Elevated Railway*, 198 Mass. 499, 508. *Anshen* v. *Boston Elevated Railway*, 205 Mass. 32. *Brisbin* v. *Boston Elevated Railway*, 207 Mass. 553, 556. As has been repeated many times, all travellers have equal rights upon the street, and, except in respects not here significant, those in control of street cars stand upon the same footing as others, and each when in the exercise of care may trust to a certain extent to others exercising some care to avoid collision. We cannot say as matter of law that this plaintiff may not have been found to have been reasonably prudent in view of the distance he actually looked in the direction from which the car came, and the extent of reliance he might place upon the conduct of the man just in front of him, and the fact that he heard no gong or noise of an approaching car.

A speed of twenty-five miles an hour while passing a car standing at a regular stopping place for the discharge of passengers without diminution of speed or giving any warning of approach might have been found to be negligent on the part of

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the defendant's motorman in charge of the car which injured the plaintiff. *Hatch* v. *Boston & Northern Street Railway*, 205 Mass. 410.

Exceptions sustained.

CROHAN J. DALY *vs.* EUGENE N. FOSS & others.

Suffolk. March 20, 1911. — July 1, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Equity Pleading and Practice, Reservation, Report, Decree, Dismissal of reservation for failure to prosecute. *Words*, "Reported."

A suit in equity, reserved for consideration by this court in accordance with the provisions of R. L. c. 159, § 29, after a hearing by a judge of the Superior Court, upon the pleadings, the evidence and certain findings made by the trial judge, is a case reported within the meaning of R. L. c. 173, § 115, which among other things provides that, if the plaintiff in a case "reported" in equity neglects to enter the report in the Supreme Judicial Court or to take the necessary measures for the hearing of the case, the court by which the case was reported may, upon application of the adverse party and after notice to all parties interested, order that the report be discharged and that the judgment, opinion, ruling, order or decree appealed from or excepted to be affirmed.

A suit in equity, after it had been heard in the Superior Court and the trial judge had made findings of fact and rulings of law, and after many further delays, for which the plaintiff in some degree was responsible, finally came before the court for final decree, and thereupon on an October 18 a reservation under R. L. c. 159, § 29, was signed by the trial judge. On the following December 5 a motion by the defendant under R. L. c. 173, § 115, that the reservation be discharged and that the rulings of the trial judge be affirmed because the plaintiff had neglected to take the necessary steps or measures for the completion of the reservation and the hearing of the case in the Supreme Judicial Court, was allowed and a final decree in accordance with those rulings was made. *Held*, that the order of the judge was within his power, because under R. L. c. 159, §§ 29, 19, the reservation should have been entered in the Supreme Judicial Court at least within thirty days after October 18.

Where, in a suit in equity seeking to enjoin the defendant from certain alleged violations of equitable restrictions upon the use of his land, the trial judge rules, "I find that I ought not, in the exercise of my discretion, to issue any injunction as prayed for in this case" and that the plaintiff had suffered no damages because of the alleged acts of the defendant, and, upon motion of the defendant under R. L. c. 173, § 115, a reservation of the case, which was made under R. L. c. 159, § 29, is discharged and the rulings of the judge are affirmed because the plaintiff neglected to take the necessary steps or measures for the completion of the reservation and the hearing of the case in the Supreme

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Judicial Court, the rulings of the judge, whether right or wrong, become the law of the case, and therefore a final decree dismissing the bill with costs is proper.

HAMMOND, J. This was a bill in equity to enforce certain restrictions upon the use of certain land. The case was tried and the trial judge * made certain findings and rulings and then reserved "the case and all questions therein" for the consideration of this court upon the pleadings, the evidence, and upon the findings made by him, "such orders to be made as law and justice require."

The defendants, alleging that the plaintiff had neglected to take the necessary measures for the completion of the reservation and the hearing in this court, moved in the Superior Court that the reservation be discharged and that the rulings made by the court be affirmed and a final decree be entered dismissing the bill with costs, "all as provided in R. L. c. 173, § 115." This motion was allowed and a final decree was entered which, after reciting that it appeared to the court "that the plaintiff has neglected to take the necessary steps or measures for the completion of the reservation and the hearing of the case in the Supreme Judicial Court," "ordered, adjudged and decreed that the reservation be discharged and the rulings of the court affirmed and the plaintiff's bill be dismissed," and for costs to the defendant. From this order the plaintiff appealed and the judge in compliance with the request made certain additional findings affecting the merits of the case. He also filed a memorandum concerning the delay of the plaintiff which is considered a part of the record.

1. The first question is whether and to what extent the final decree is conclusive, or in other words what if any question is before this court on this appeal.

R. L. c. 178, § 115, reads as follows: "If an appellant or an excepting party or if the plaintiff in a case reported, at law, in equity or in probate proceedings, neglects to enter the appeal, exceptions or report in the Supreme Judicial Court or to take the necessary measures by ordering proper copies to be prepared or otherwise for the hearing of the case, or if an excepting party neglects to provide a transcript of the evidence or of the instruc-

* *Fessenden*, J.

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tions to the jury within the time ordered by the justice under the provisions of section one hundred and eleven, the court in which the appeal was taken or by which the exceptions were allowed or the case reported may, upon the application of the adverse party and after notice to all parties interested, order that the appeal be dismissed, the exceptions overruled or the report discharged, and that the judgment, opinion, ruling, order or decree appealed from, or excepted to, be affirmed."

Previous to St. 1888, c. 94, in case of the failure of the party whose duty it was to enter the case in this court the application for affirmation of the judgment or order in question had to be made to this court. Pub. Sts. c. 150, § 16; c. 151, § 20. But by St. 1888, c. 94, a change was made, applicable however only to appeals and exceptions, by which the court in which the appeal was taken or the exceptions allowed "may" upon the application of the adverse party and after due notice affirm the judgment or decree in question. Amendments to the statute were made from time to time until it finally took the shape in which it now stands. R. L. c. 173, § 115. See Sts. 1895, c. 153, § 2; 1896, c. 451; 1900, c. 372, § 1. Report of the Commissioners on the Revision of 1902, page 1547.

In *Ingalls* v. *Ingalls*, 150 Mass. 57, the libellant filed in this court a complaint for the affirmation of a decree of the Superior Court in a libel for divorce to which the libellee had excepted and had neglected to enter the exceptions in this court. The application was refused on the ground that under St. 1888, c. 94, it should have been made to the Superior Court. The court there says that the statute was intended to obviate the necessity of applying by complaint to this court for the affirmation of the judgment or order in the trial court, and "to substitute as the appropriate tribunal for affirming such order, etc., when the appeal or exceptions had not been entered, the court where such order, etc., had originally been made. While the word 'may' is used in the statute of 1888, it was not intended by this use to leave the right to apply to this court for affirmation as it had before existed, and thus to make the remedy provided merely cumulative." And in *Erlund* v. *Manning*, 160 Mass. 444, the same rule was applied to an appeal from the decision of a justice of this court. Both of the foregoing decisions were made under

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St. 1888, c. 94, which applied only to appeals and exceptions. R. L. c. 173, § 115, applies to a case reported in equity; and a case reserved is a case reported within the meaning of the statute.

The power given to the trial court under this statute is given only in certain classes of cases therein enumerated. One class includes a case where the plaintiff upon a report in equity neglects to enter the report or to take the necessary steps by ordering proper copies to be prepared, or otherwise, for the hearing of the case in this court. Upon this appeal the first question is whether the allegations of the decree that the plaintiff has neglected to take the necessary steps for the completion of the reservation and the hearing of the case in this court is true. Unless the court was justified in coming to that conclusion it had no right to pass the order of affirmation.

After many delays for which the plaintiff seems to have been in some degree responsible, the terms of the reservation were finally substantially settled and, the cause coming on for final decree, the reservation was signed October 18, 1910. The statutes provide in substance that the reservation of a judge of the Superior Court shall be entered at least within thirty days from the time of the reservation or forthwith thereafter. R. L. c. 159, §§ 19, 29. The decree was made December 5, 1910. It is apparent that a case within R. L. c. 173, § 115, was before the court as set forth in the decree, and the court had the power to affirm the rulings.

The rulings thus affirmed must stand. The appeal does not bring to this court the correctness of such rulings. The order of affirmation made by the trial court acting within its jurisdiction has the same effect as when formerly made by this court. The party who by exception, appeal, report or reservation seeks to have the action of the trial court modified in any way by this court by his default loses the right to the judgment of this court; and the findings and rulings affirmed, whether right or wrong, become the law of the case.

It becomes necessary to see what it was that the court affirmed. There was no final decree as in the case of an appeal from a final decree. The case being reserved under R. L. c. 159, § 29, the trial court, instead of entering a formal decree, ruled

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substantially as to the form the decree should take and left the formal entry until the rescript should come from this court. This is in accordance with the usual practice.

In the present case the court made twenty-seven "findings and rulings" of fact and law. In paragraph 24 is the following: "I find that I ought not, in the exercise of my discretion, to issue any injunction as prayed for in this case." This is in legal effect a ruling that the plaintiff is not entitled to an injunction. This ruling having been affirmed by the court under R. L. c. 173, § 115, for reasons hereinbefore stated cannot be revised by this court, but must stand as the conclusive declaration of the law of the case. And under the finding of the court that the plaintiff has suffered no damages there is no occasion to keep the bill for the assessment of damages. Under these circumstances the decree dismissing the bill and for costs should be affirmed with the costs since the decree.

2. The conclusion which we have reached as to the final decree renders it unnecessary to consider at length the questions arising upon the defendants' motion for the dismissal of the appeal. The decree denying the motion is affirmed.

So ordered.

G. F. Ordway, for the plaintiff.

S. J. Elder, (*H. R. Bailey* with him,) for the defendants.

QUIMBY N. EVANS & others *vs.* COUNTY OF MIDDLESEX.

Suffolk. March 24, 1911. — July 3, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, Construction, Performance and breach. *Practice, Civil*, Findings by trial judge, Exceptions. *Architect. Evidence*, Presumptions and burden of proof.

In an action of contract against a county with a declaration containing a count upon a contract in writing for the erection of a power electric and heating plant by the plaintiff for the defendant, performance of which was alleged to have been stopped unjustifiably by the defendant, and a count upon a *quantum meruit* for work done and materials furnished under the contract, it appeared that the contract provided that the work was to be done and the materials were to be furnished "under the direction of an engineer selected by the architect and to the satisfaction of the architect and such engineer," who were to be "the sole

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judges as to the fitness of the work and materials," and that, in case "said work or materials . . . shall be unsatisfactory to the said architect" and upon the plaintiff being notified thereof in writing, the plaintiff was to remove the unsatisfactory work or materials and to supply in place thereof "the work and materials satisfactory to the architect." It also appeared that upon the plaintiff's proposing to use in the performance of the contract a certain kind of pipe covering, the architect notified him not to do so but to use a kind made by a certain manufacturer, and that, upon the plaintiff persisting in his course, the architect terminated the contract. An auditor to whom the case was referred found that the covering that the plaintiff had proposed using conformed to the requirements of the wording of the contract and that he could not find that it was inferior in quality to that demanded by the architect, that the architect thought that the covering specified in the contract was made only by the manufacturer whose product he insisted upon, but that he was mistaken. The case subsequently was heard by a judge without a jury and there were in evidence the auditor's report, certain documents, and oral testimony, the weight of which seemed strongly to show that the plaintiff complied with the terms of the contract and that the architect was wholly without justification in fact for the action he took, but there was some evidence tending to show that only the kind of covering insisted upon by the architect would satisfy the terms of the contract. The judge found for the defendant, and the plaintiff alleged exceptions. *Held*, that under the contract the architect was constituted an arbitrator to determine practical questions of performance that might arise during the progress of the construction, and, so long as he acted honestly and with reasonable efficiency, his action was binding on the parties; that the evidence was not quite so conclusive as to make no finding reasonably possible except that the architect had acted unreasonably, capriciously or fraudulently, and therefore that the exceptions must be overruled.

Where at the trial of an action an affirmative issue must be established by one party upon evidence, a part of which is oral, ordinarily a ruling that such party as matter of law is entitled to recover cannot be given.

A contract in writing between a county and one who agreed to erect for the county a power electric and heating plant provided that the work was to be done and the materials were to be furnished "under the direction of an engineer selected by the architect and to the satisfaction of the architect and such engineer," and that, in case "said work or materials . . . shall be unsatisfactory to the said architect," and upon the plaintiff being notified thereof in writing, the plaintiff was to remove the unsatisfactory work or materials and supply in place thereof "the work and materials satisfactory to the architect." The contract required the use of a certain pipe covering called "Air Cell Class A." The contractor proposed to use a covering which he contended answered that description, but the architect refused to accept it, and insisted that a covering made by a certain manufacturer should be used, and, upon the contractor persisting in his course, the architect terminated the contract. At the trial of an action by the contractor against the county for breach of the contract, there was evidence to substantiate the contention of the architect, as well as evidence tending to show that he was mistaken and ignorant. The contractor asked the presiding judge to rule that "if it is found that the covering furnished by the plaintiff was not inferior in quality, or otherwise, to that" which the architect insisted upon, "the architect and engineer had no legal right to reject the same for reasons stated by them in their evidence." The ruling was refused, the judge found for the defendants; and the contractor alleged an exception.

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Held, that, aside from the fact that the ruling requested a finding of fact which the judge had a right to determine against the plaintiff, so that it might have been refused properly on that ground alone, the ruling asked for did not contain an accurate statement of law, because, under the above quoted provisions of the contract, a rejection of the covering which the contractor proposed to use might have been within the legal right of the architect and engineer if they acted in good faith and not whimsically, even though they acted somewhat ignorantly or mistakenly.

By a contract in writing relating to the erection for a county of a power electric and heating plant, approval by the county commissioners of all sums to be paid for labor and materials besides those required by the contract was necessary and a method of arbitrating disputes was provided for. It also was provided that the contractor should not be entitled to demand or receive payment for any portion of the work done or materials furnished "until each and all of the specifications" of the contract "are complied with and the architect shall have given his certificate to that effect, and until all disputes, disagreements, and questions between the parties . . . affecting the right to any portion of the amount claimed shall have been settled as above provided for." The architect under other provisions of the contract caused the contractor to cease work and the contractor brought an action against the county upon an account annexed for labor and materials furnished in addition to those required by the contract, at the trial of which it appeared that the labor and materials were ordered in writing by the county commissioners representing the county, and that the architect never had fixed the fair value of them because, as he testified, "there was no necessity of my approving them until the final adjustment of the accounts." Requests for arbitration were made which came to nothing. The judge found for the defendant and the plaintiff alleged exceptions. *Held*, that the finding was warranted, since the jury might have found that the requirement in the contract of approval by the county commissioners of payments for items not called for by the contract was not waived.

CONTRACT, with a declaration described in the opinion, for sums alleged to be due to the plaintiffs for work done and materials furnished upon a power electric and heating plant for the county buildings of the defendant in that part of Cambridge called East Cambridge. Writ dated October 17, 1899.

The case was referred to Henry E. Warner, Esquire, as auditor, and in the Superior Court was heard by *Hardy*, J., without a jury, upon the auditor's report and other evidence, both oral and documentary.

At the close of the evidence the plaintiffs asked the trial judge to rule as follows:

"(1) That upon all the evidence the plaintiffs are entitled to recover.

"(2) That the plaintiffs, by offering to supply an air cell class A covering, fulfilled the terms of their contract.

"(3) That if it is found that the covering furnished by the

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tiff and ran into the street, pursued by his companion, that the companion took the shovel from him and threw it under the defendant's wagon, that the plaintiff, pursuing, wept and, standing behind the team, was crying out for her shovel when the driver backed the team and she was run over. *Held*, that the questions, whether the plaintiff properly was upon the street unattended and, if so, whether at the time of the accident she was exercising the degree of care which under the circumstances a reasonably careful and prudent child of her age would have exercised, and if she was not properly upon the street unattended, whether there was negligence on the part of the sister in caring for her which should be imputed to her, were for the jury.

TORT, for personal injuries received by the plaintiff, who was three years and eight months of age when injured, and caused by a loaded wagon of the defendant running over her when it was being backed as stated in the opinion. Writ dated December 7, 1904.

In the Superior Court the case was tried before *Richardson*, J.

There was evidence tending to show that the plaintiff and her sister Catherine, eleven years of age, her brother Timothy and a playmate Walter Doyle, each six years of age, were playing at making mud pies in a yard about thirty feet square in front of their home, numbered 140 on Ward Street in Boston, on August 18, 1903; that the yard opened upon the public street and that there was no gate that could be closed; that her mother, having occasion to go to a store for groceries some five minutes' walk from her house, before starting directed the plaintiff's sister to care for the children and not to allow them to go on the street. In pursuance with this order of her mother, the plaintiff's sister sat on the front door steps of the house, caring for and watching over the children while the mother was away. Some five or six minutes after the mother had departed, the plaintiff asked her sister for a slice of bread and butter and she, seeing the children playing at their mud pies within three or four feet of the steps of the house and telling them to remain there until she returned, went into the house and got the bread and butter, and was absent about three minutes. Hardly had the door closed behind her, when the plaintiff's brother seized her shovel and ran from the yard into the street. He was pursued by Walter Doyle, who took the shovel from him and threw it under the defendant's wagon. The plaintiff followed and stood behind the wagon, weeping and crying out, "Give me that shovel." Other facts are stated in the opinion.

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At the close of the evidence for the plaintiff, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in March, 1911, before *Knowlton*, C. J., *Hammond*, *Braley*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

S. A. Fuller, for the plaintiff.

J. Lowell & J. A. Lowell, for the defendant.

BRALEY, J. The defendant having obtained a verdict by order of the trial court at the close of the plaintiff's evidence, the questions presented by the exceptions are, whether there was any evidence for the jury of the defendant's negligence, or of her due care.

The accident happened on a public way, while the defendant's servant, in charge of a team loaded with material to be delivered in an adjoining lot, was waiting for an opportunity to drive through a passageway on to the lot and unload. While the evidence for the plaintiff is meagre and somewhat contradictory, the jury could have found that he knew of the presence of children, who were at play around or near the wagon upon which some of them had climbed, and that if he had looked carefully before backing around he would have seen that the plaintiff had joined or was near the group. The team ahead of him having passed in, unloaded, and returned, the exceptions state, that "before he got on his team" he ordered the children off, and the jury further could have found that, without looking to the rear, he then backed the wagon partly around for the purpose of turning into the passageway or lot, and ran over the plaintiff. It is no defense as between the parties, that the plaintiff was not a traveller, and, knowing of the presence of children, the driver in making the movement was called upon to use ordinary care not to endanger the plaintiff. In the opinion of a majority of the court, the question of the defendant's negligence was for the jury. *Slattery* v. *Lawrence Ice Co.* 190 Mass. 79. *Jaehnig* v. *J. G. & B. S. Ferguson Co.* 197 Mass. 364.

If the jury were satisfied that the plaintiff, who was three years and eight months old when injured, was capable of going upon the street unattended, the degree of care required of her was that of a reasonably careful and prudent child of her age.

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It could not have been ruled as matter of law, that she should have anticipated that the team might be backed against her, as she stood in the street crying for a toy shovel which a playmate had taken from her and thrown under the wagon. *Sullivan* v. *Boston Elevated Railway*, 192 Mass. 37, 44, and cases there collected. If the jury determined that she was incapable of properly caring for herself, then the question of her sister's negligence, in whose care she had been placed temporarily by their mother, also was a question of fact, for reasons so fully stated in *Butler* v. *New York, New Haven, & Hartford Railroad*, 177 Mass. 191, and *Sullivan* v. *Boston Elevated Railway*, 192 Mass. 37, that it is unnecessary to repeat them or to recite the evidence from which they would have been justified in finding that her sister had not been unfaithful. See also *Ingraham* v. *Boston & Northern Street Railway*, 207 Mass. 451.

Exceptions sustained.

HENRY KINSLEY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. March 28, 1911. — June 30, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, In use of highway, Street railway.

At the trial of an action against a street railway company, there was evidence tending to show that the plaintiff, while a passenger upon a vestibuled car of the defendant upon a street where there were double tracks, and as he was about to alight therefrom, looked ahead through the vestibule, but could not determine whether a car was approaching on the other track because his view was "troubled" by the vestibule, that thereupon he alighted, stepped a "foot or so" from the car and looked forward, but that, because of the position of the car from which he had alighted, he could see no car approaching; that thereupon he passed around behind the car from which he had alighted, and, as he reached its farther side, looked thirty or forty feet up the other track and saw no car coming, that a man passed across the track just before him and showed no "signs of an approaching car," that thereupon the plaintiff "assumed that it was safe for him to cross" the other track and did so, and, when he reached the middle of the track, was struck by a car which was coming from his right past the car which he had just left at the rate of twenty-five miles an hour and upon which no warning gong had been sounded. *Held*, that the questions, whether the plaintiff was in the exercise of due care and whether the motorman was negligent, were for the jury.

TORT for personal injuries caused by the plaintiff being run into by a street car of the defendant on Galen Street in Newton

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as he was crossing the street after having alighted from and having passed around the rear of another car. Writ dated March 16, 1909.

In the Superior Court the case was tried before *Wait*, J. At the close of the evidence a verdict was ordered for the defendant; and the plaintiff alleged exceptions.

The facts are stated in the opinion.

H. C. Long, for the plaintiff.

H. D. McLellan, for the defendant.

RUGG, J. The plaintiff's testimony was that, while a passenger inside a car of the defendant and approaching his destination, he looked forward, but his view was "troubled" by the vestibule so that he could not determine as to the approach of a car. He then got off the car, and, to quote the exceptions, "faced forward just after he stepped off the car about a foot or so from the edge of the step and looked forward . . . and was unable to see any car from that direction because the car from which he had alighted obstructed the view and he heard no car. He turned around and passed behind the car and just as he arrived at the left hand rear corner of the car he gave a glance up the track some thirty or forty feet and did not see any car and heard none, though he knew that cars were accustomed to run from the direction in which he looked. Mr. Johnson was about four feet ahead of him, and Mr. Johnson did not show any signs of an approaching car. . . . He assumed then it was safe for him to cross and he did so. He did not look any more after passing the corner of the car." As he was in the middle of the tracks he was struck by an on-coming car and injured. There was evidence tending to show that the speed of the moving car was twenty-five miles per hour, which did not slacken until after the accident, and that no gong was sounded.

This is not a case where a pedestrian crossing a street close behind a stationary car emerges upon a parallel track without taking any heed to see whether another car may be coming. The plaintiff had looked before, both while in the car and on alighting, under conditions which as the event proved did not give him much if any information, but he testified that on reaching the corner of the car he had left he looked up the track thirty

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plaintiffs was not inferior in quality, or otherwise, to that of the Asbestos Paper Company, the architect and engineer had no legal right to reject the same for the reasons stated by them in their evidence.

"(4) That on all the evidence the architect did not exercise that judgment and capability required of an architect with such powers as are delegated to him under the contract.

"(5) That on all the evidence the engineer did not exercise that judgment and capability required of an engineer with such powers as are delegated to him under the contract.

"(6) That the plaintiffs had a right to use any covering of a kind embodied in the term 'Air Cell Class A,' and that the architect and engineer could only refuse to accept the same because of quality, and that on all of the evidence it appears that neither the architect nor the engineer exercised any judgment on the question of quality.

"(7) That the burden of showing good faith in the exercise of the power vested in the architect and engineer is on the defendant, and that from all the evidence it does not appear that either the architect or the engineer had sufficient knowledge of air cell sectional coverings to exercise the rights given them under the contract.

"(8) That the plaintiffs, in offering the covering which they did, fulfilled the terms of their contract, and upon all the evidence the defendant failed to show any legal justification for not accepting the same.

"(9) That upon all the evidence the architect failed to exercise the good faith and judgment legally required of him, and his failure to approve the covering offered by the plaintiffs does not bar them from a recovery in this action.

"(10) That upon all the evidence the engineer failed to exercise the good faith and judgment legally required of him, and his failure to approve the covering offered by the plaintiffs does not bar them from a recovery in this action."

The judge refused to rule as requested by the plaintiffs, and found for the defendant. The plaintiffs alleged exceptions.

The facts are stated in the opinion.

J. A. Brackett, for the plaintiffs.

G. L. Mayberry, (*J. M. Gibbs* with him,) for the defendant.

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RUGG, J. This is an action of contract. The declaration contains five counts, only four of which are now material. The first count is upon a written contract between the plaintiffs and the defendant, by which the former undertook to erect a power electric and heating plant for the defendant, and alleged partial performance by the plaintiffs and unreasonable refusal by the defendant to permit them to complete it. The third and fourth counts are for work done and materials supplied, as extras to the contract. The fifth count is upon a *quantum meruit* for the same work claimed under count one. The answer sets up that the contract did not comply with St. 1898, c. 170, or St. 1897, c. 137, and that the work under the contract was not done as required by it to the satisfaction of the architect, who for this reason acting under the contract stopped further performance of it. The case was sent to an auditor, who found the facts in favor of the plaintiffs. It was thereafter tried upon the auditor's report and additional evidence, part of which was oral, before a judge of the Superior Court, who found generally for the defendant. The case is brought here by the plaintiffs' exceptions to the refusal of the trial judge to grant certain rulings.

The contract provided that the work was "A. . . . to be done and materials furnished under the direction of an engineer selected by the architect and to the satisfaction of the architect and such engineer. . . . And in case . . . said work or materials . . . shall be unsatisfactory to the said architect, then the said party of the second part shall, on being notified thereof, in writing, by the said architect, immediately remove such unsatisfactory work or materials, and supply the place thereof with other work and materials satisfactory to the architect." "B. . . . all work contemplated and described by the plans and these specifications and this contract shall be done to the satisfaction of the said architect and engineer . . . and who shall be the sole judges as to the fitness of the work and materials as herein set forth. If any objection is made by the architect or engineer to any work or materials, then the said party of the second part shall remove such unsatisfactory work and materials." "C. And if, at any time, any of the work mentioned in said specifications is not progressing, or any materials are not in accordance with the said

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specifications, to the entire satisfaction of the said architect, after five days' notice having been served on the said party of the second part by the said architect, then the said party of the first part shall have the right to enter upon and take possession of said work, and remove all materials that are considered by said architect unfit for said work, and furnish suitable materials instead therefor." The trouble arose over the furnishing of "Sectional Covering . . . Air Cell Class A" required by the specifications. The plaintiffs provided a kind of covering for pipe covering, which, they contended, complied with this description, and the architect contended that it did not, and on refusal by the plaintiffs to substitute he gave the notice to remove the materials, and subsequently to terminate the contract. The auditor found that the covering furnished by the plaintiffs was "Air Cell Sectional Covering Class A," and was so known in the trade, and was unable to find that it was inferior in quality to that demanded by the architect, which was manufactured by a particular manufacturer alone, and that the engineer and architect both supposed that the only kind of covering which would conform to the specification was that manufactured only by a particular manufacturer. He does not find that this was through corruption, but the inference appears to be that it was through ignorance. At the trial before the Superior Court there was some evidence tending to show that the goods furnished by the plaintiffs did not comply with the specification in that Class A covering meant a 5-ply covering, while that furnished by the plaintiffs was 4-ply covering. The weight of the evidence including the auditor's report seems strongly to support the view that the plaintiffs complied with the terms of the contract, and that the architect was wholly without justification in fact for the action he took, yet under the familiar rule that the findings of fact of a trial court are not open to revision by an appellate tribunal and can be set aside only when they have no foundation in evidence, we cannot disturb a general finding for the defendant. The evidence is not quite so conclusive as to enable us to say that no finding was reasonably possible, except that the architect acted unreasonably, capriciously, arbitrarily, wilfully or fraudulently. *Harper* v. *Dewey*, 191 Mass. 411. *Handy* v. *Bliss*, 204 Mass. 513. The architect by the terms of the con-

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tract was constituted an arbitrator by the parties to determine practical questions of performance that might arise during the progress of the construction. So long as he acted honestly and with reasonable efficiency his action was binding upon the parties. *Norcross* v. *Wyman*, 187 Mass. 25.

The first ruling asked for by the plaintiffs, which was a general one, that they were entitled to recover, could not have been given properly. The burden of proof was upon the plaintiffs, and where an affirmative issue must be made out by one party upon evidence, a part of which is oral, ordinarily such a ruling cannot be given as matter of law.

The second ruling called for a finding of fact, which, by refusing to give, the trial judge apparently decided adversely to the plaintiffs. In view of the finding which must have been made in order to refuse the second prayer, the third was also properly refused. Moreover this prayer was not quite an accurate statement of the law. It might be that "the covering furnished by the plaintiffs was not inferior in quality or otherwise to that of the Asbestos Paper Company," and yet a rejection of it might be within the legal right of the architect and engineer acting in good faith and not whimsically, even though somewhat ignorantly or mistakenly.

The fourth, fifth, seventh and eighth requests ask for findings of fact, which by its refusal the court seems not to have been able to make.

The sixth prayer called for a ruling of law which was correct in its terms but for a finding of fact which it appears from the other findings of fact requested the court was unable to make.

The eighth and ninth prayers were requests for rulings of law based upon a certain construction of all the evidence. But, as there was some slight evidence that a five-ply covering alone would satisfy the terms of the contract, it does not appear that the facts existed which were assumed in the prayer.

The contract also provided that the plaintiffs should not be entitled to demand payment for any portion of the work done or materials furnished "until each and all of the stipulations" contained in the contract "are complied with and the architect shall have given his certificate to that effect, and until all disputes, disagreements, and questions between the parties hereto, affect-

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ing the right to any portion of the amount claimed shall have been settled as above provided for." It was found by the auditor and does not appear to have been disputed at the trial, that the labor and materials referred to in the third and fourth counts were in addition to that required under the contract, and were ordered in writing by the county commissioners, who represented the defendant. The fair value to be added to the contract price was not fixed by the architect as required by the contract, for the reason as testified by him that "There was no necessity of my approving them until the final adjustment of the accounts." Requests for arbitration were made, but came to nothing. A clause in the contract required that the commissioners should also approve the additional sum to be paid for all additions to the contract. This was a detail of the contract which might have been waived, but whether it was waived or not was a fact which it may be inferred from the general finding in favor of the defendant the trial judge was unable to make. The bill of exceptions does not state that it contains all the material evidence, and the defendant has taken this point in argument. Exceptions which depend upon a finding of fact may be disposed of on this ground. *Appleton* v. *O'Donnell*, 173 Mass. 398. *York* v. *Barstow*, 175 Mass. 167. *Cohen* v. *Longarini*, 207 Mass. 556. But we have placed the decision on a broader ground.

Although the case appears to be one of great hardship to the plaintiffs, the governing rules of law make no other result possible upon these exceptions.

Exceptions overruled.

SABIN P. SANGER, trustee, *vs.* EMILY BOURKE & others.

Suffolk. March 16, 1911. — July 21, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Devise and Legacy. Will.

Upon a bill for instructions by a trustee under a will, if it appears that, by the literal terms of the will, property devised in trust is left undisposed of in an event which has happened, but from a reading of the whole will it appears that the testator's intention was that the property in such event should go to the

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issue of his children, the trustee will be instructed to carry out the intention of the testator as expressed in the whole will.

A testator by his will gave the residue of his estate to a trustee with instructions to pay the income to his nine children, naming them, to be equally divided among them, and, "in case of the decease of either of my said children without children or lawful issue, I then will that the income and interest so given as aforesaid shall in like manner be divided among the survivors, but in case my said children die leaving issue, then the capital of such deceased child's share shall be equally divided among such issue share and share alike, to their heirs and assigns forever." The last of the children died without issue. The trustees, under instructions from this court given in *Cook* v. *Smith*, 101 Mass. 341, had paid to the issue of each of the other children, as such children died, the fractional part of the fund of which their representative parents had received the income. In a suit in equity seeking instructions as to whether that portion of the principal which was left after the death without issue of the survivor of the children should be distributed as intestate property or should be divided among the issue of the deceased children, it was *held*, that the plain intention of the testator was to dispose of his whole estate, and, in the contingency which had happened, that the remaining principal should be divided in equal shares among his grandchildren and among the issue of any deceased grandchildren by right of representation.

If real estate is devised to a trustee in trust to pay the income to certain named children of the testator until the death of the survivor of them, and an intention of the testator is apparent from a reading of the whole will, although it is nowhere expressed therein in terms, that, if after several of the children had died leaving issue the survivor should die without issue, then the trust estate should pass to the grandchildren of the testator in equal shares and to the issue of deceased grandchildren by right of representation, upon the happening of such a contingency the fee of the real estate does not pass to those entitled thereto without further action of the trustee, but he should convey it to them.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 10, 1910, by the trustee under the will of Windsor Fay, late of Boston, for instructions as to the disposition of the trust estate at the termination of the trust on the death of the last holder of a life interest in the income, and also as to whether the trustee should convey to those entitled thereto as tenants in common such of the trust estate as was realty or whether, on the death of the last holder of a life interest in the income, the realty passed to the person entitled thereto without further action on the part of the trustee.

George D. Burrage, Esquire, was appointed guardian *ad litem* to represent persons not ascertained or not in being, who were or might become interested in the subject matter of the suit, and Stephen H. Tyng, Esquire, was appointed guardian *ad litem* for certain minors.

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The case was reserved by *Hammond*, J., for determination by the full court.

The portion of the will which related to the trust was as follows:

"Item. The residue and remainder of my estate real, personal and mixed, be the same more or less, or wherever to be found of which I may die seized or possessed, or entitled so to be, I do give, devise and bequeath the same to my son, William C. Fay and William A. Hyde and to the survivor of them and to his executors and administrators, but in trust to and for the several trusts uses and purposes hereinafter expressed and declared, and none other.

"In trust to manage the real and personal estate and from time to time to receive and collect the rents and income thereof and after making all needful repairs and deducting all expenses including insurance and all other reasonable charges necessarily incident to said trust, then

"In trust to pay over quarterly to my said wife, Dorcas, the income and interest of one third part of my said personal estate exclusive of the legacies aforesaid during the term of her widowhood.

"In trust, in the second place, to pay over quarterly the rent, income and interest of the said residue of my estate including and embracing that the use whereof is devised to my wife during widowhood, when the same shall fall in to my several children, Dorcas C. Smith, wife of Nathaniel P. Smith, Caroline Pond, wife of Sabin Pond, Mary H. Brewer, wife of Nathaniel Brewer, Lydia Ann Robbins wife of Henry Robbins, Lucinda Fay, Eliza Fay, Helen Maria Fay, William C. Fay, Francis W. Fay, to be equally divided between them, and in case of the decease of either of my said children without children or lawful issue, I then will that the income and interest so given as aforesaid, shall in like manner be divided among the survivors, but in case my said children die leaving issue then the capital of such deceased child's share shall be equally divided among such issue share and share alike to their heirs and assigns forever.

"And it is especially my will and intention that the said several shares of income and interest growing and arising out of the trust fund or property aforesaid and made payable to my

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daughters through the agency of the trustees as aforesaid should be paid to my daughters upon their own separate order or receipt to be severally signed by themselves free from the control or interference of any husband or husbands, they now have or may in future have and not in any way to be subject to the debts of any such husband or husbands or to be liable upon any attachment, trustee process, judgment or execution and which said shares of income and interest as aforesaid and also the said capital are hereby expressly declared inalienable and not subject to sale, mortgage, lien, or any other incumbrance whatsoever by my said daughters or any husband or husbands they may have.

"And I do hereby authorize and empower my said trustees or the survivor of them to grant and sell the whole or any part of my estate real or personal with full power to execute any deed or deeds effectual in law, to pass a complete title thereto at and for such prices as they may deem proper, but the avails thereof are to be by them retained and held for the same uses and purposes as the lands or other property would be held by the trusts before created."

Other facts are stated in the opinion.

H. H. Darling, for the plaintiff, stated the case.

W. N. Buffum, for issue of Windsor Fay who were of age.

G. D. Burrage, guardian *ad litem* for persons not ascertained or not in being, *pro se*.

S. H. Tyng, guardian *ad litem* of certain minors, *pro se*.

SHELDON, J. Windsor Fay by his last will gave the residue of his estate to trustees, and directed them to pay all the income and interest thereof to his nine children, naming them, to be equally divided among them. He then provided as follows: "In case of the decease of either of my said children without children or lawful issue, I then will that the income and interest so given as aforesaid, shall in like manner be divided among the survivors, but in case my said children die leaving issue then the capital of such deceased child's share shall be equally divided among such issue share and share alike to their heirs and assigns forever."

One of these children died before the testator; and before August, 1868, three others of the testator's children died, of whom two left children and one had no issue. The trustees

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under the will thereupon filed a bill in equity in this court for instructions; and it was decided that no part of the principal of the trust fund should be distributed as undevised estate upon the death of a child without issue, but that the children of those of the testator's children who had died leaving issue were entitled respectively by representation to have "the capital of such deceased child's share," that is, the fractional part of the fund of which their respective parents received the income, withdrawn from the fund and divided among them. *Cook* v. *Smith*, 101 Mass. 341. It was declared by Wells, J., in giving the opinion of the court (p. 342), that the will showed "that the testator intended to dispose of the principal as well as the income" of the fund, and to give the remainder after the life interest of his children "to the issue of such as should leave issue." He also said (p. 343) that "the will is made operative to pass the entire principal of the trust fund to the issue of such children as leave issue." The question however was not determined, because not then presented, whether the issue of a deceased child, whose share of capital already had been separated from the trust fund, were entitled to any share of the principal or income which would fall in by the subsequent decease without issue of any child of the testator. After this decision, all but one of the five remaining children of the testator successively died, leaving issue, and there was paid over to such issue respectively one fifth, one fourth, one third, and one half of the trust fund as it existed at those respective times. A daughter of the testator, Lydia A. Robbins, was thus left the sole survivor of the testator's children, and she received accordingly the whole income of the diminished trust fund during her life. She has now died without issue; and the question arises whether the fund is to go to the heirs of the testator as undevised or intestate estate, or whether by the terms of the will it devolves upon the issue of the other children of the testator, whose then expectant shares of the capital had before the death of Mrs. Robbins been separated from the trust fund.

We cannot read this will without seeing that it was the intention of the testator to dispose of his whole estate, and moreover to provide that all the residue of his estate, after the termination of the life estate of his own children, should go to the issue of those

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children. That was the view taken by this court in *Cook* v. *Smith*, 101 Mass. 341. But in the event which has happened the existing fund has been left undisposed of by the literal terms of the will; for Mrs. Robbins has left no issue to whom it can go and no surviving brothers and sisters to whose shares it can be added. Unless there is to be found in the will not only a manifestation of the testator's intention that this fund should be disposed of by the will, but also a clear and certain designation of the persons to whom it is to be paid, it must go as undevised property to his heirs at law. *Keating* v. *Smith*, 5 Cush. 232. *Buffington* v. *Maxam*, 152 Mass. 477. *Stearns* v. *Stearns*, 192 Mass. 144. *Walton* v. *Draper*, 206 Mass. 20. If, however, the language of the will does plainly and distinctly show that he intended a particular disposition of the fund, the court must give effect to that intention.

The case is governed by our decisions in *Metcalf* v. *Framingham Parish*, 128 Mass. 370, and *Boston Safe Deposit & Trust Co.* v. *Coffin*, 152 Mass. 95. Both of these cases go upon the ground stated by Gray, C. J., in the former of them: "If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." In each of the cases cited, the facts presented closely resembled those which are before us. In each case, the contingency which actually happened had not in terms been provided for, just as in the case at bar the event of the testator's last surviving child leaving no issue was not specifically provided for; but in each case the language which the testator used showed clearly and unmistakably that his intention would have been frustrated if effect had not been given to it in the manner adopted by the court. So in this case the language used leads directly and certainly to the conclusion that he intended the whole of this fund to go finally to the issue of his children to the exclusion of everybody else, although he did not concern himself with its disposition after it should have come into the hands of such issue. We are not framing for the tes-

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tator a conjectural intent, such as he might or perhaps naturally would have expressed, but which is not imported by the words which he has used. That we could not do. *Child* v. *Child*, 185 Mass. 376. *Boston Safe Deposit & Trust Co.* v. *Buffum*, 186 Mass. 242. *Todd* v. *Tarbell*, 187 Mass. 480. As was said by Loring, J., in *Lathrop* v. *Merrill*, 207 Mass. 6, 10, "the province of the court is not to conjecture what the testator's intention was and then read it into the will, but to ascertain his intention by construing the words which he used as the declaration of it." If it necessarily appears from those words that he intended to make a disposition of his property which he has not formally and precisely expressed, his intention will be declared and carried into execution. Rugg, J., in *Jones* v. *Gane*, 205 Mass. 37, 45. The principle has been declared and applied in many cases, both in this Commonwealth and in England. See, besides those already cited, *Hood* v. *Boardman*, 148 Mass. 330; *Seaver* v. *Griffing*, 176 Mass. 59; *Dary* v. *Grau*, 190 Mass. 482; *Polsey* v. *Newton*, 199 Mass. 450; *Towns* v. *Wentworth*, 11 Moore P. C. 526; *Abbott* v. *Middleton*, 7 H. L. Cas. 68; *Parker* v. *Tootal*, 11 H. L. Cas. 143; *Greenwood* v. *Greenwood*, 5 Ch. D. 954. The reasoning in *Little* v. *Silveira*, 204 Mass. 114, though the point was not directly involved, tends to the same effect. And see the other cases cited in *Metcalf* v. *Framingham Parish*, *ubi supra*.

But it has been argued that the language of the testator does not show that he intended the fund, in the event which has happened, to go to the issue of his deceased children. It is said that he dealt with the case of children dying without issue, and definitely provided that in that case it should go to his own surviving children, but chose to make no provision for the event of the last survivor having no issue. It is argued that he really provided that no part of the share of which children dying without issue had enjoyed the income should go to the issue of children who had previously deceased, but that the same should go to the surviving children. It is urged that his intention was that the issue of a deceased child, having received the "capital of such deceased child's share" as it was at the time of the latter's death, should not thereafter receive any further part or share of the trust fund; for what he said and all that he said was

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that the income of a child dying without issue should be divided among the survivors, which of course meant the surviving children of the testator.

This argument has been very ingeniously put by counsel, but its fallacy is that it first assumes that the testator could not have intended to make any other or further disposition of his property than what he has expressly and formally stated, and then rests upon the further assumption that the giving of a bequest to one set of beneficiaries, the issue of deceased children, together with a different disposition of other property or shares to take effect in a certain event, necessarily shows an intention that the first set of beneficiaries should in no event share in such other property. A similar line of argument applied to the facts of those cases would have reversed the decisions in *Metcalf* v. *Framingham Parish*, 128 Mass. 370, *Boston Safe Deposit & Trust Co.* v. *Coffin*, 152 Mass. 95, and in many of the other cases already cited, in which interests in bequests have been either created or extended beyond what could have been given under the mere words of the wills, in order to carry out the manifest intention of the testator. That intention must be gathered from all the language of the will, in connection with the circumstances that were known to the testator when he made it. We are not to look merely to singled out words, in which he plainly failed to express the whole of the intention which is apparent upon the face of the will.

In this case we are satisfied by reading the will that the testator intended to dispose of all his estate and to provide that it finally should go to the issue of his children.

We are of opinion upon the language of the will that distribution of the fund should now be made in equal shares among the grandchildren of the testator and the issue of any deceased granchildren by right of representation. *Dexter* v. *Inches*, 147 Mass. 324. *Hills* v. *Barnard*, 152 Mass. 67. *Jackson* v. *Jackson*, 153 Mass. 374. *Dary* v. *Grau*, 190 Mass. 482. *Coates* v. *Burton*, 191 Mass. 180. *McClench* v. *Waldron*, 204 Mass. 554.

Real estate constituting part of the trust fund should be conveyed by the trustee to the beneficiaries. *Keating* v. *Smith*, 5 Cush. 232.

Decree accordingly.

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ELIAS BERDOS *vs.* TREMONT AND SUFFOLK MILLS.

Middlesex. January 27, 1911. — July 24, 1911.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & RUGG, JJ.

Labor, Employment of children. *Child*. *Negligence*, Due care of child, Violation of statute, In factory, Employer's liability, Proximate cause. *Proximate Cause*. *Words*, "Assumption of risk."

Any person, who suffers special damage from the infraction of St. 1909, c. 514, §§ 56, 61, which in substance prohibit the employment in any factory, workshop or mercantile establishment of a child under fourteen years of age and impose a heavy penalty upon any one who participates in his employment, has a right of action against the violator of the statute. Per RUGG, J.

If a child under fourteen years of age is injured in a factory whose proprietor has employed him in violation of St. 1909, c. 514, §§ 56, 61, which in substance prohibit the employment in any factory, workshop or mercantile establishment of a child under fourteen years of age and impose a heavy penalty upon any one who participates in his employment, and he can trace his injury to the breach by his employer or his servants or agents of the duty imposed by the statute as its direct and proximate cause, he has a right of action against his employer.

There is no hard and fast rule that at any particular age a minor is presumed to be able to comprehend risks or to be capable of negligence.

It is the law of this Commonwealth that the age of a child is an important, though not a decisive, factor in determining his capacity to exercise care, and that the decision of that question is not helped or hampered by any presumption of fact or of law, and it is commonly a question of fact, to be determined in each case as it arises, whether, considering his age, experience, intelligence, judgment and alertness, the particular child was capable of understanding the nature and extent of the danger in which he was placed.

In an action against the proprietor of a mill by a child, who, while under fourteen years of age, was employed in the mill in violation of St. 1909, c. 514, §§ 56, 61, which prohibit the employment in a mill, workshop or mercantile establishment of a child so young, and received injuries whose proximate cause was the violation of the statutory duty of his employer, the plaintiff in order to recover must prove that at the time of the injury he was in the exercise of due care, and his recovery is barred in case negligence on his part contributed to cause his injuries.

The mere fact that a child under fourteen years of age asked for employment in a mill does not preclude him from recovering from his employer, in case his employer, in violation of St. 1909, c. 514, §§ 56, 61, employs him, for any injury which he receives in the course of his employment and while he is in the exercise of due care and of which the employer's violation of the statute is a direct and contributing cause.

At the trial of an action by a child against the proprietor of a cotton mill for personal injuries received in the mill when the plaintiff was less than fourteen years of age and caused by a violation on the part of his employer of St. 1909, c. 514, §§ 56, 61, prohibiting employment of a child of that age, there was evi-

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dence that at the time of the injuries the plaintiff had been in this country about seven weeks, of which four weeks had been spent in the employ of the defendant, that he never before had worked in a factory or mill, that he could not speak or read the English language, that while waiting for his work, which was about spinning mules, he had stood with his back toward some gears covered by a guard or shield, on which one of his hands rested, and that in some way that hand got beyond or under the guard and was injured. No instruction or warning as to such a danger had been given to him. *Held*, that the question, whether the plaintiff was in the exercise of due care, was for the jury.

In an action against the proprietor of a mill by a child under fourteen years of age, whom the defendant, in violation of St. 1909, c. 514, §§ 56, 61, which prohibited the employment in a mill, workshop or mercantile establishment of a child so young, had employed in the mill and who had been injured by his hand being caught in some cogs which were partially exposed, the defense, that by an implied term of his contract of employment the child had assumed all obvious risks of the business, apparatus and place of his work, is not open to the defendant, because, the contract of employment being prohibited by the statute, the defendant cannot be permitted to show the alleged contract and his own consequent criminal guilt in order to interpose a defense.

In an action of tort for personal injuries against the proprietor of a mill by a child under fourteen years of age, whom the defendant, in violation of St. 1909, c. 514, §§ 56, 61, which prohibit the employment in a mill, workshop or mercantile establishment of a child so young, had employed in a mill, no defense is open to the defendant which has for its foundation a term or provision of the illegal contract of employment, but if a defense of so called "assumption of risk" on the part of the plaintiff is in the nature of a contention that the plaintiff's own negligence contributed to cause his injury, or that he was lacking in due care, such a defense is not affected by the statute.

Statement by RUGG, J., of the meaning of the defense, "assumption of risk" by an employee, as used to denote a defense in an action by the employee against his employer for personal injuries received in the course of the employment.

At the trial of an action by a child under fourteen years of age against the proprietor of a cotton mill for personal injuries received in the mill and alleged to have been caused by a violation on the part of the employer of St. 1909, c. 514, §§ 56, 61, prohibiting employment of a child of that age, there was evidence that at the time of the injury the plaintiff had been in this country about seven weeks, of which four weeks had been spent in the employ of the defendant, that he never before had worked in a factory or mill, that he could not speak or read the English language, that while waiting for his work, which was about spinning mules, he had stood with his back toward some gears covered by a guard or shield, on which one of his hands rested, that in some way that hand got beyond or under the guard and was injured and that no instruction or warning as to such a danger had been given to him. *Held*, that there was evidence which would warrant a jury in finding that the breach by the defendant of the duty imposed by the statute was a direct and contributing cause of the injury to the plaintiff.

TORT for personal injuries received by the plaintiff on January 28, 1907, when less than fourteen years of age, while employed in the defendant's factory, the declaration containing

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three counts, the first and third counts alleging as the cause of the injury a failure properly to instruct and warn the plaintiff as to the dangers of his employment, and the second count alleging as the cause of the injury "the act of the defendant in employing the plaintiff contrary to the provisions of R. L. c. 106, §§ 28, 33, and acts amendatory thereof." Writ dated January 15, 1908.

In the Superior Court the case was tried before *Hardy*, J. The evidence relating to the injury to the plaintiff is stated in the opinion. The evidence relating to the employment of the plaintiff by the defendant was in substance as follows: When the plaintiff went to the defendant's factory to obtain employment, he was taken to the second hand, to whom he showed a paper which a boy had given him and which he "had been told to show to the boss and get a job." The plaintiff "thought the paper was his" and told the second hand so, and he thought his own name was on the paper. He gave his name as Elias Berdos. No one asked him his age.

At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

H. A. Varnum, (*F. N. Wier* with him,) for the plaintiff.

J. J. Rogers, (*F. E. Dunbar* with him,) for the defendant.

RUGG, J. There was evidence tending to show that the plaintiff at the time of his injuries was less than fourteen years old, and had been in this country about seven weeks, during four of which he had been in the service of the defendant. He had never before worked in a factory, and could not speak or read English. While waiting for his work, which was about spinning mules in a cotton factory, he stood with his back toward some gears covered by a guard or shield, on which one of his hands rested. In some way not exactly explained, this hand got beyond or under the guard, and was cut by the gear. No instructions or warning were given him as to such a danger. The plaintiff testified that he had never looked to see, and did not know that there were gears under the guard.

R. L. c. 106, § 28, as amended by St. 1905, c. 267, (see now St. 1909, c. 514, § 56,) prohibited the employment in any factory, workshop or mercantile establishment, of a "child under the

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age of fourteen years," while St. 1906, c. 499, § 1, (see now St. 1909, c. 514, § 61,) imposed a heavy penalty for violation of this law. This statute was passed in the exercise of the police power as a humanitarian measure and in the interest of the physical well-being of the race. It prevents children of immature judgment and undeveloped bodies from working under conditions likely to endanger their health, life or limb. While these considerations are important for society, they are also significant for the child. This statute imposes a duty upon every employer with reference to children under fourteen years of age. It is a general rule of statutory interpretation that a violation of a duty created by statute, resulting in damage to one of the class for whose benefit the duty was established, confers a right of action upon the injured person. A difficulty often arises to determine whether a private right arises for breach of the statutory duty imposed or whether the only consequence is to subject the violator to punishment. It is not enough for a plaintiff to prove a violation of a statute concurrent with his injury, but he must go further and show that a condition to which the statute directly relates has a causal connection with his injury.

It becomes necessary to determine the purpose of this statute. That may be ascertained by the purview of the Legislature in the language it employed, having regard to prevailing social conditions, the evil attacked, the remedy provided, the practical results likely to flow from one interpretation or the other, and the public policy established. Although this statute has educational as well as economic aspects, and may have been enacted in part to supplement the general law as to compulsory school attendance, it is not directed exclusively against illiteracy, as is St. 1911, c. 310, for example. The titles of the various statutes, of which the present is the successor, as well as its context in the chapter of the Revised Laws, entitled "Of employment of labor," indicate that one of its chief purposes is to govern labor conditions. The title of the first statute touching this subject was "An Act in relation to the employment of children in manufacturing establishments," St. 1866, c. 273. In most if not all subsequent revisions of this act, the words, "employment of children" or equivalent language have been used. St. 1876,

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c. 52. Pub. Sts. c. 48. St. 1883, c. 224. St. 1885, c. 222. St. 1887, c. 121. St. 1888, c. 348. St. 1892, c. 352. This statute is a declaration of legislative policy that parents and guardians of children undertaking to act in their own behalf shall no longer be permitted to bargain at all as to the work of children of tender years in specified employments. It relates to a class who are least able to protect themselves by appreciating and avoiding danger, or to request instructions as to matters beyond their understanding, or to arrange by contract for their protection, or to resist any compulsion arising from their own necessities or other circumstances. There would be difficulty in discovering instances of failure to comply with the law arising from the tendency of both parties to such failure to conceal the wrongdoing. The statute has to do with the protection of childhood. It pertains to a subject of universal interest fundamentally vital in its broader bearings to the future of mankind. These considerations require the inference that the remedy intended by the Legislature against the delinquent employer was not confined to the criminal one. The right of civil action in addition may well have been regarded as a more efficacious means of compelling observance of the law. Therefore, while the public purposes of this act are important, any member of the public so situated with reference to its subject matter as to suffer special damage by its infraction has a right of action against the violator of the statute. *Bourne* v. *Whitman*, *ante*, 155. *Norton* v. *Eastern Railroad*, 113 Mass. 366. *Turner* v. *Boston & Maine Railroad*, 158 Mass. 261, 263. *Groves* v. *Wimborne*, [1898] 2 Q. B. D. 402. *David* v. *Britannic Merthyr Coal Co.* [1909] 2 K. B. 146. *Davis & Sons* v. *Taff Vale Railway*, [1895] A. C. 542. *Gibson* v. *Dunkerley Brothers*, 102 L. T. Rep. 587. *Rose* v. *King*, 49 Ohio St. 213. *Baxter* v. *Coughlin*, 70 Minn. 1. *Pauley* v. *Steam Gauge & Lantern Co.* 131 N. Y. 90. *Sipes* v. *Michigan Starch Co.* 137 Mich. 258. This principle was recognized and adopted, although different results were reached in its application, in *Union Pacific Railway* v. *McDonald*, 152 U. S. 262, and in *Menut* v. *Boston & Maine Railroad*, 207 Mass. 12. This statute does not fall within the class illustrated by *Dahlin* v. *Walsh*, 192 Mass. 163, *Kirby* v. *Boylston Market Association*, 11 Gray, 249, *Atkinson* v. *Newcastle & Gateshead*

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Waterworks Co. 2 Ex. D. 441, and *Johnston & Toronto Type Foundry Co.* v. *Consumers' Gas Co. of Toronto*, [1898] A. C. 447, which held that the plain purpose of the statutes was to affect only public obligations and to confer no private rights. It follows that a minor who can trace his injury to a breach of the duty imposed by this statute as its direct and proximate cause may have a right of action therefor.

In ordinary actions for personal injury, the plaintiff must prove, as the first branch of his case, that he was himself in the exercise of due care. This involves certain phases of the subsidiary questions of assumption of risk and contributory negligence. Minors of tender years, although held to the same rule of law in its general statement as adults, are yet required to exercise only that degree of care which is naturally incident to their youth, inexperience and immature stage of mental development. Although cases have arisen sometimes where the comprehension by the minor of the risks of the employment has been so plain as to warrant a ruling of law, usually that question and the duty and extent of warning resting upon the defendant have raised inquiries of fact. It is common knowledge that children under the age of fourteen are lacking in prudence, foresight and restraint, and that their curiosity and restlessness have a tendency to get them into positions of danger. There is some point in every life where these conditions are present in such degree as to deprive the child of capacity to assume risk intelligently, or to be guilty of negligence consciously. That point varies in different children for divers reasons. There is no hard and fast rule that at any particular age a minor is presumed to be able to comprehend risks or to be capable of negligence. Extreme cases can be stated which obviously fall on one side or the other of the line. In some jurisdictions it has been held that *prima facie* a child under fourteen years of age is presumed not to be capable of contributory negligence. *Tucker* v. *Buffalo Cotton Mills*, 76 S. C. 539, and cases cited. *Tutwiler Coal, Coke & Iron Co.* v. *Enslen*, 129 Ala. 336. But the sounder doctrine seems to be that age is an important though not decisive factor in determining capacity, and that the decision of that question is not helped or hampered by any legal presumption. This is the law of this Commonwealth. *Ciriack*

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v. *Merchants' Woolen Co.* 151 Mass. 152, 156. *Sullivan* v. *India Manuf. Co.* 113 Mass. 396. *McCarragher* v. *Rogers*, 120 N. Y. 526. See other cases collected in 17 Ann. Cas. 353. It is commonly a question of fact to be determined in each case as it arises, whether considering his age, experience, intelligence, judgment and alertness, the particular child was capable of understanding the nature and extent of the danger in which he was placed. A situation, which might carry plainly to the mind of an adult comprehension of danger, might make little or no impression upon a child. This might arise either from immaturity or from the lack of the caution and judgment natural to youth. The contributory negligence of a child stands upon the same ground. His carelessness depends not alone upon the act done, but upon the degree of knowledge and intelligence of the actor. This statute by prohibiting the employment of children under fourteen years of age in certain employments does not purport in terms to change the ordinary rules of negligence applicable to actions of tort arising between master and servant, as do certain other statutes. See St. 1909, c. 514, § 143, and c. 363; *Chicago, Burlington & Quincy Railway* v. *United States*, 220 U. S. 559. See also St. 1906, c. 463, Part II. § 245, as amended by St. 1907, c. 392; *Commonwealth* v. *Boston & Lowell Railroad*, 134 Mass. 211; *Jones* v. *Boston & Northern Street Railway*, 205 Mass. 108. A plaintiff employed in violation of its terms must still prove his own due care, though conduct which might be pronounced reasonably cautious in him might fall far short of it in an adult.

Nor was the plaintiff while at work acting in violation of law. The statutes here under consideration are plainly different from those before the court in *Moran* v. *Dickinson*, 204 Mass. 559, in that they impose no penalty upon the child for being employed. The only person subjected to punishment under St. 1906, c. 499, § 1, is one who "employs" or "procures or, having under his control a minor under such age, permits such minor to be employed." This language as well as the general purpose of the statute excludes the idea that the minor himself is included. The circumstance that this plaintiff asked for his own employment does not prevent him from invoking whatever protection the statute may throw around him, nor from relying upon whatever liability may spring from its violation by the defendant.

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Considering the age of this plaintiff, his inexperience and ignorance of our language and customs, and his proximity to partially hidden moving machinery, it could not have been ruled properly as matter of law that he was not in the exercise of such care as ought reasonably to have been expected of him. It is plain from the plaintiff's testimony that he did not understand the danger of getting his fingers under the guard, nor can it be said as matter of law that the perils of his position were so plain that a child of his years and inexperience ought to have comprehended them. The circumstances of the case at bar do not bring it within the class of cases like *Burke* v. *Davis*, 191 Mass. 20, *Marshall* v. *Norcross*, 191 Mass. 568, *Simoneau* v. *Rice & Hutchins*, 202 Mass. 82, *Cohen* v. *Hamblin & Russell Manuf. Co.* 186 Mass. 544, *Taylor* v. *Hennessey*, 200 Mass. 263, and *Kelley* v. *Calumet Woolen Co.* 177 Mass. 128.

The violation of the statute by the defendant rendered its negligence a question of fact for the consideration of the jury. It was said in *Bourne* v. *Whitman*, *ante*, 155, "It is universally recognized that the violation of a criminal statute is evidence of negligence on the part of the violator as to all consequences that the statute was intended to prevent." The subject is there discussed at length and the reasonableness of this rule clearly established. The statute does not go to the extent of conclusively establishing negligence as a part of the penalty for its violation. It is not so drastic in its terms as that under consideration in *Dudley* v. *Northampton Street Railway*, 204 Mass. 448. It is the ordinary penal statute enacted for the protection of a particular class in the community. But it does not mean that a defendant who employs a child in violation of its terms is thereby conclusively rendered liable for every accident which occurs to him, while in the service. It is conceivable that injury might result wholly from the minor's own act so obviously negligent, that it could not be argued intelligently not to have been within his comprehension and quite disconnected with his work. Under such circumstances there could be no recovery. The form of the prohibition in this statute is like that which inhibits travelling by a horse drawn sleigh without bells. R. L. c. 54, § 8. Yet it cannot be contended that one violating this statute is rendered thereby necessarily responsible civilly for the damages of an

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accident in which he may be a participant. The usual rules of negligence are superimposed upon any liability claimed to grow out of the breach of the statute. *Counter* v. *Couch*, 8 Allen, 486. We are not able to follow in this regard the reasoning of the majority of the court in *Marino* v. *Lehmaier*, 173 N. Y. 530. The statute does not deprive a defendant, charged in a civil action with liability arising from its violation, of the ordinary defenses except contractual assumption of risk as hereafter pointed out which are open to a defendant in that class of actions. The violation of the statute, if it has a causal connection with the injuries sustained by the plaintiff, is evidence of negligence.

The statute has, however, the further effect of preventing the defendant from shielding himself behind the defense of contractual assumption of risk. The reason for this is that this branch of the doctrine of assumption of risk rests upon an implied term of the contract of employment to the effect that the employee assumes all the obvious risks of the business, apparatus and place of his work. *Murch* v. *Wilson's Sons Co.* 168 Mass. 408. *Crimmins* v. *Booth*, 202 Mass. 17, 22. The contract of employment, however, in the case at bar was absolutely prohibited by the terms of the statute, and was therefore an illegal act on the part of the defendant. The defendant cannot be permitted to show an illegal contract and his own consequent criminal guilt in order to interpose a defense. Any contractual assumption of risk in the light of the fact that the plaintiff was under fourteen years of age would reveal as an essential element the violation of a penal statute. No court consciously will enforce, directly or indirectly, an illegal contract. *O'Brien* v. *Shea*, 208 Mass. 528, and cases cited. The phrase, "assumption of risk," is sometimes used in another sense as applicable to the intentional and voluntary continuance of labor under conditions, the dangerous nature of which is fully comprehended, both as to its character, extent, and degree of capacity to harm. When used in this sense sometimes it is resolved into such conduct as is equivalent to an agreement on the part of the employee to relieve the employer from a duty which would otherwise rest on him. *Leary* v. *Boston & Albany Railroad*, 139 Mass. 580, 587. *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155. *O'Toole* v. *Pruyn*, 201 Mass. 126, 129. See *Thomas* v. *Quarter-*

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maine, 18 Q. B. D. 685, 698; *Yarmouth* v. *France*, 19 Q. B. D. 647, 651, 657; *Smith* v. *Baker & Sons*, [1891] A. C. 325, 355, 360. So far as it involves a contractual element in this sense, it is not available to the defendant for the same reason. Other parts of the doctrine of assumption of risk are referable generally to due care and negligence. These are not changed by the statute. They are explained at length in *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155, and it is not necessary to go over them again here. See also *Schlemmer* v. *Buffalo, Rochester & Pittsburg Railway*, 205 U. S. 1, 12; *Bagley* v. *Wonderland Co.* 205 Mass. 238, 244.

There is nothing in the statute, however, to indicate an intent that the defense of contributory negligence should be abolished. It does not purport to regulate, further than is implied by other statutes of like character, the civil liability arising between the parties. Having stamped the act of the employment of minors under the prohibited age as criminal and thereby available as evidence of negligence to one whose civil rights are affected, it leaves undisturbed in any other respect the principles by which liability may be enforced and defense may be established.

This is the general rule as to the interpretation of penal and inhibitory statutes, and has been applied to a wide variety of cases. *Taylor* v. *Carew Manuf. Co.* 143 Mass. 470. *Bourne* v. *Whitman*, *ante*, 155, and cases cited. *Schlemmer* v. *Buffalo, Rochester & Pittsburg Railway*, 220 U. S. 590, 596. *Delk* v. *St. Louis & San Francisco Railroad*, 220 U. S. 580, 587. *Denver & Rio Grande Railway* v. *Norgate*, 72 C. C. A. 365; *S. C.* 202 U. S. 616. *Erdman* v. *Deer River Lumber Co.* 104 C. C. A. 482. To give this statute a broader effect would be to go outside the usual canons of statutory construction. There appears to be no sound reason for establishing an exception respecting particular enactments, which have no especially distinguishing features. If the Legislature had intended to change the fundamental rules of the law of negligence in the present instance, the expression of such an intention would have been simple. The great weight of authority as to child labor statutes supports this view. *Smith* v. *National Coal & Iron Co.* 135 Ky. 671. *Darsam* v. *Kohlmann*, 123 La. 164, 171, 172. *Queen* v. *Dayton Coal & Iron Co.* 95 Tenn. 458, 465. *Iron*

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& Wire Co. v. *Green*, 108 Tenn. 161, 165. *Sterling* v. *Union Carbide Co.* 142 Mich. 284. *Syneszewski* v. *Schmidt*, 153 Mich. 438. *Beghold* v. *Auto Body Co.* 149 Mich. 14. *Rolin* v. *Tobacco Co.* 141 N. C. 300. *Gaines Leathers* v. *Blackwell Durham Tobacco Co.* 144 N. C. 330. *Norman* v. *Virginia-Pocahontas Coal Co.* 68 W. Va. 405. *Burke* v. *Big Sandy Coal & Coke Co.* 68 W. Va. 421. *Sharon* v. *Winnebago Furniture Manuf. Co.* 141 Wis. 185, 189. *Dalm* v. *Bryant Paper Co.* 157 Mich. 550. *Roberts* v. *Taylor*, 31 Ont. 10. *Nickey* v. *Steuder*, 164 Ind. 189, 196. (See, however, *Inland Steel Co.* v. *Yedinak*, 172 Ind. 423.) *Jacobson* v. *Merrill & Ring Mill Co.* 107 Minn. 74. *Perry* v. *Tozer*, 90 Minn. 431. *Bromberg* v. *Evans Laundry Co.* 134 Iowa, 38, 46. *Evans* v. *American Iron & Tube Co.* 42 Fed. Rep. 519, 522. *Peters* v. *Gille Manuf. Co.* 133 Mo. App. 412, 419. *Nairn* v. *National Biscuit Co.* 120 Mo. App. 144, 147. *Kirkham* v. *Wheeler-Osgood Co.* 39 Wash. 415. There is a considerable body of authority which holds that a statute of this sort abrogates the defense of contributory negligence.* But for the reasons stated the other view seems more consonant with general principles of statutory interpretation and of the law of negligence.

The plaintiff is not entitled to recover unless the violation by the defendant of its statutory duty to him directly contributed to his injury. The breach of law upon which a plaintiff may found his right of recovery must be not merely a condition or an attendant circumstance, but a contributory cause. *Newcomb* v. *Boston Protective Department*, 146 Mass. 596. *Moran* v. *Dickinson*, 204 Mass. 559. *Finnegan* v. *Winslow Skate Manuf. Co.* 189 Mass. 580. The injury must be referable to the breach of the statute as a cause. There was sufficient evidence that the plaintiff's damage was due to the act of the defendant in putting a minor of tender years at work in a position of dan-

* *Strafford* v. *Republic Iron & Steel Co.* 238 Ill. 371. *American Car & Foundry Co.* v. *Armentraut*, 214 Ill. 509. *Koester* v. *Rochester Candy Works*, 194 N. Y. 92. *Marino* v. *Lehmaier*, 173 N. Y. 530. [See however *Lee* v. *Sterling Silk Manuf. Co.* 134 App. Div. (N. Y.) 123.] *Lenahan* v. *Pittston Coal Mining Co.* 218 Penn. St. 311. *Stehle* v. *Jaeger Automatic Machine Co.* 220 Penn. St. 617; *S. C.* 225 Penn. St. 348. *Sullivan* v. *Hanover Cordage Co.* 222 Penn. St. 40.

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ger to him on account of his youth, which a more mature person might have avoided. Apparently, the sole cause of the injury was the temperamental uneasiness and heedlessness of the consequences of restless movements characteristic of childhood when placed in the midst of rapidly moving machinery. Hence the violation of the statute may have been found to be a contributing or perhaps the sole cause of the injury suffered. *Hankins* v. *Reimers*, 86 Neb. 307. *Starnes* v. *Albion Manuf. Co.* 147 N. C. 556. *Casteel* v. *Pittsburg Vitrified Paving & Building Brick Co.* 83 Kans. 533. *Casperson* v. *Michaels*, 142 Ky. 314. The injury was not necessarily so remote from the illegal act that there could be no causal connection between the two, as in *Belleveau* v. *S. C. Lowe Supply Co.* 200 Mass. 237, 241. *Stone* v. *Boston & Albany Railroad*, 171 Mass. 536, and the decisions cited in *Davis* v. *John L. Whiting & Son Co.* 201 Mass. 91, 96.

The result is that the plaintiff is entitled to go to the jury upon the question of his own due care. He must make out his case, as does the ordinary plaintiff in cases of negligence. He must also show that his injury resulted from the negligence of the defendant. He may establish this, however, by showing a violation by the defendant of the statute in question and by that alone, provided the violation be found to have contributed directly to the injury. Such proximate cause might arise from the fact that he was a child by reason of his tender years so restless, heedless and active as to be naturally incapable of appreciating the dangers of the position in which he was placed by the defendant. The defense, that the plaintiff assumed by contract the risks which surrounded him, is not open to the defendant. But the defense that the plaintiff contributed to his injury by failure to exercise the degree of care, which the normal child of his age, intelligence and experience ought to have exercised, is open to the defendant. The direction of a verdict for the defendant was error.

Exceptions sustained.

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JOHN L. COX vs. FRED SAVAGE.

Suffolk. March 8, 1911. — June 20, 1911.*

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Practice, Civil, Agreement as to facts, Ordering verdict. *Evidence*, Presumptions and burden of proof.

At the trial of an action by the assignee of a corporation, engaged in the sale and lease of milking machines and the sale of dairy supplies, against one who had been its "division manager" for a certain territory, to recover upon an account annexed for certain supplies alleged to have been furnished to the defendant by the corporation, the plaintiff introduced in evidence an agreement, signed by the attorneys for the parties to the action, providing that the items and credits stated in the account annexed were substantially correct so far as they went; "that the defendant had some agency relations with the corporation previous to April 9 of a certain year; that thereafter up to some time in the following July they had business dealings and relations, agency or otherwise, when their dealings and relations ceased"; that "during the period of his said agency relations with the" corporation "the defendant received certain milking machinery supplies from the company, and was charged therefor by the company in his accounts with them; that some of the supplies were in his possession at the time of the termination of his relations with the company. The defendant claims and the plaintiff denies that the defendant should be credited for such supplies as were in his possession at the time of the termination of such relations, the defendant contending and the plaintiff denying that the relations and agreements of the defendant with such company were such that said credit should be given. It therefore is agreed that the only question to be tried before the jury shall be whether or not the defendant shall have any credit for such goods as were in his possession at the termination of his relations with said company; and that if the jury answer that the relations between the defendant and said company were such that said defendant should not have such credit, then the jury may find for the plaintiff in" a certain sum; "but that if the relations between the defendant and the" corporation "were such as to entitle him to credit for such supplies which he had on hand at the termination of his relations with said company, then the court may refer the case to an assessor who shall determine the amount of credit to which the defendant is entitled because of such supplies." *Held*, that the foregoing did not amount to an agreement to shift the burden of proof from the plaintiff as to his general right to recover and to impose it upon the defendant to establish as an independent defense his right to return the supplies on hand and to receive credit for them.

At the trial of an action by the assignee of a corporation, engaged in the sale and lease of milking machines and the sale of dairy supplies, against one who had

* The opinion in this case was withdrawn on an application for a rehearing. This was denied on September 5, 1911, when the opinion was returned to the Reporter.

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been its "division manager" for a certain territory, to recover upon an account annexed for certain supplies alleged to have been furnished to the defendant by the corporation, it appeared that the items in the account annexed were correctly stated. The defendant introduced evidence tending to show that he was elected "division manager" by the directors of the corporation in November of a certain year, at a meeting when a majority of the directors were present, and that it also then was voted that his "commission" be twenty per cent "of installation fees and rentals of" milking machines "installed in his territory," that the corporation had its depot of supplies in Holyoke, that immediately after the directors' meeting the defendant had a talk with them and asked that they send him supplies at his place of business, to which the president replied that they did not have money enough to run two stations of supplies and that if he had them he would have to advance money toward them; that thereafter and until the time of the severance of his relations with the corporation two years later the defendant acted for the corporation in the selling and leasing of milking machines and kept supplies at his place of business, both supplies and machines being shipped to him on his order and invoiced to him at a gross price less his commission; that the defendant made collections and remitted to the corporation, but at no stated times; that in April of the second year of his service as "division manager," the directors of the corporation discontinued that office and notified him thereof; that during April a statement was made by the defendant and his agent of all transactions between the corporation and himself to that date, and the amount shown thereby to be due to the corporation from him was paid by him, the amount being accepted by the corporation in full satisfaction of all items previous to the time when the defendant ceased to be division manager with exceptions not material; that thereafter the corporation made to the defendant a proposition that he deal with it as a "dealer" subject to certain conditions, and that milkers and supplies be furnished to him at certain stated "discounts" from the list prices, and until the following July efforts were made to reach a mutual working basis, which proved futile. It was agreed that previous to the discontinuance of the office of "division manager," the defendant had had some agency relation with the corporation. All of the items in the account annexed which were material were for transactions which occurred after the defendant ceased to be "division manager." In letters to the defendant in May, the general manager of the corporation used the term "agent" as to the defendant. At the termination of his relations with the corporation in July, the defendant had on hand certain supplies and contended that he then had a right to return the supplies and have credit for them. The corporation refused to receive the supplies, and the defendant contended that he was entitled to credit for them in the action by the assignee. The parties agreed that, if the defendant's contentions were not sustained, judgment should be entered for the plaintiff on the account annexed, and that if his contentions were sustained the case should be referred to an assessor to determine the amount of the credit to which he was entitled. The presiding judge ordered a verdict for the plaintiff. *Held*, that the verdict was ordered improperly, since there was evidence for the consideration of the jury in support of the defendant's contention.

CONTRACT upon an account annexed. The declaration alleged that the claim which was the basis of the action formerly had belonged to the New England Dairy Supply Company and

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that the plaintiff had acquired it by assignment. The account annexed contained four items of transactions previous to April 18, 1908, and twenty-seven items of transactions after that date, the last of which was dated June 16, 1908. Writ dated September 13, 1909.

In the Superior Court the case was tried before *Hardy*, J. The plaintiff offered in evidence a paper entitled "Agreed Statement as to Facts," signed by the attorneys for the parties in their behalf, by the first paragraph of which it was agreed in substance that the plaintiff had a right of action against the defendant for any amount that was due to the New England Dairy Supply Company at the date of the assignment. By the second paragraph it was agreed that "the items and credits stated in the account annexed to the plaintiff's declaration and bill of particulars are correct so far as they go," with certain exceptions not material. The remaining paragraphs of the agreement were as follows:

"That the defendant had some agency relations with the New England Dairy Supply Company prior to April 9, 1908. That thereafter up to some time in July, 1908, they had business dealings and relations, agency or otherwise, when their dealings and relations ceased.

"That during the period of his said agency relations with the New England Dairy Supply Company the defendant received certain milking machinery supplies from the said company, and was charged therefor by the company in his accounts with them; that some of the said supplies were in his possession at the time of the termination of his relations with the company. The defendant claims and the plaintiff denies that the defendant should be credited for such supplies as were in his possession at the time of the termination of such relations, the defendant contending and the plaintiff denying that the relations and agreements of the defendant with such company were such that said credit should be given.

"It therefore is agreed that the only question to be tried before the jury shall be whether or not the defendant shall have any credit for such goods as were in his possession at the termination of his relations with said company; and that if the jury answer that the relations between the defendant and said com-

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pany were such that said defendant should not have such credit, then the jury may find for the plaintiff in the sum of $282.70 with interest from the date of the writ; but that if the relations between the defendant and the New England Dairy Supply Company were such as to entitle him to credit for such supplies which he had on hand at the termination of his relations with said company, then the court may refer the case to an assessor who shall determine the amount of credit to which the defendant is entitled because of such supplies."

After introducing the agreed statement as to facts in evidence, the plaintiff rested.

The defendant introduced the record of a directors' meeting of the New England Dairy Supply Company held on November 1, 1906, when a quorum of the board were present and the following votes were passed:

"By vote of directors Mr. Fred Savage of Windsor, Vt., was elected Div. Manager to care for New Hampshire and Vermont.

"By vote of directors the commission of the Div. Manager be 20% of installation fees and rentals of B. L. K. milking machines installed in his territory."

The defendant testified that directly after this meeting the defendant had a talk with the president of the corporation and the other directors who had been present at the meeting and during the talk asked the president to give him some supplies in Vermont. "They said they didn't have money enough to run two stations of supplies, and if I had the supplies I would have to advance money towards the supplies."

On April 2, 1908, by vote of the board of directors of the corporation, the office of manager for Vermont and New Hampshire was discontinued and the defendant was notified thereof. Later in April the then general manager of the company interviewed the defendant and his bookkeeper, and the defendant's bookkeeper, acting by the defendant's authority, made up a statement of all debit and credit items between the defendant and the corporation down to that date. The balance shown by that statement was paid to the corporation by the defendant in May and was accepted by the corporation in satisfaction of all items previous to that date except those shown in the account annexed, which are not material.

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Immediately following that interview, the general manager of the corporation wrote to the defendant a letter stating, among other things, the following: "Instead of acting as manager of the New England Dairy Supply Company in Vermont and New Hampshire as heretofore, your relationship will be that of a dealer operating throughout these two States mentioned, with" certain territory excepted. "It is understood that you alone shall solicit sales in the territory referred to above and through advertising and other ways the" corporation "will aid you as much as possible to do so, but it is further understood that this company shall be free to make installations in your territory in special cases, of which you will be advised as such cases arise." "It is further understood that you will maintain the prices as noted," and the prices were stated. "It is understood that" the corporation "is at liberty to change these prices as they see fit, giving you proper notice. You will receive from the above prices discounts as follows:" Here followed stated discounts. "You will be billed for all material purchased by you from us as shipments are made. A statement will be sent to you at the first of every month of your account with us, and it is understood that you will make settlement by the tenth of the month."

On May 15, 1908, the general manager of the corporation, in a letter to the defendant explaining an item in an account rendered to him, wrote, "I wish to say the goods shipped covered renewals, thus the discount to you of 10%"; and in another letter of the same date he wrote, as to an inquiry made by a possible customer regarding the cow milker, "I would suggest that it might be in order to write to them again, telling them that you are agent for the milker in that territory." In response to a request by the defendant for letterheads of the company, the general manager wrote to the defendant on May 19, 1908, "When you were acting as manager of New Hampshire and Vermont for this company, it was proper that you should carry on your correspondence on the letterheads of the company, but acting in your present capacity as an agent of the company, I would prefer you not to use our letterheads."

There was no evidence of any reply to the letter of the general manager of April 18, 1908, until July 17, 1908, when the defend-

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ant wrote to the corporation stating that he had "already bought and paid for the exclusive rights to handle your milking machine in Vermont and New Hampshire." This contention of the defendant was not relied on further, and negotiations between the parties thereafter ceased. There was no evidence that previous to the time when negotiations ceased the defendant had set forth the contention which he relied on at the trial.

At the close of the evidence the presiding judge ordered the jury to answer in the negative the question, whether the defendant was entitled to credit for the supplies which he had on hand, and then ordered a verdict for the plaintiff in accordance with the agreement as to facts. The defendant alleged exceptions.

Other facts are stated in the opinion.

The case was argued at the bar in March, 1911, before *Knowlton*, C. J., *Hammond*, *Braley*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

W. Keyes, for the defendant.

E. V. Grabill, for the plaintiff.

RUGG, J. This is an action of contract upon an account annexed. The defendant was in November, 1906, appointed division manager of a corporation (of which the plaintiff is assignee) for Vermont and New Hampshire. The business of the corporation was dealing in milking machines and dairy supplies. At this time the defendant had a talk with the president and directors of the corporation, in which, to quote the defendant's testimony, "They said they didn't have money enough to run two stations of supplies, and if I had the supplies I would have to advance money toward the supplies." The company's depot of supplies was then in Holyoke. The defendant acted for the corporation from this time until July, 1908, at first leasing and afterwards selling machines, and he kept certain supplies at his place in Vermont for local needs. Both machines and supplies were shipped to the defendant on his order, and invoiced to him at a gross price less his commission. It is not contended that the machines were sold to him, but it is contended that the supplies were sold to him. The defendant made collections and remitted, but at no stated times. A change in management of the corporation occurred in March, 1908, and negotiations followed for

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the establishment of a new business arrangement between it and the defendant. These came to naught, and the relations ceased in July, 1908. At this time the defendant had in his possession certain supplies, which he claimed the right to return and receive credit for under the terms of his original contract with the corporation.

The case was tried upon oral evidence, and an "Agreed Statement as to Facts." A question arises as to its construction. Among its terms were these: that "the items and credits stated in the account annexed to the plaintiff's declaration . . . are correct so far as they go," with exceptions not here material. "That during the period of his said agency relations with the New England Dairy Supply Company the defendant received certain milking machinery supplies from the said company, and was charged therefor by the company in his accounts with them; that some of the said supplies were in his possession at the time of the termination of his relations with the company. The defendant claims and the plaintiff denies that the defendant should be credited for such supplies as were in his possession at the time of the termination of such relations, the defendant contending and the plaintiff denying that the relations and agreements of the defendant with such company were such that said credit should be given," and that "the only question to be tried before the jury shall be whether or not the defendant shall have any credit for such goods as were in his possession at the termination of his relations with said company."

This does not amount to an agreement to shift the burden of proof from the plaintiff as to his general right to recover and to impose it upon the defendant to establish as an independent defense his right to the return of the supplies on hand and be credited for them. The dispute concerns the precise terms of the arrangement between the parties, and is, whether the defendant was a purchaser of all supplies sent or whether he was a consignee ultimately liable only for such as he finally sold. The controversy does not relate to what in pleading is a confession and avoidance, but to the character of the original contract as to the dairy supplies. This is confirmed by the fact that the declaration is a count upon an account annexed, and the answer a general denial and payment. The burden of proof as to what

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the contract was rested upon the plaintiff throughout. *Wylie* v. *Marinofsky*, 201 Mass. 583. The agreed facts admitted the correctness of the items, but did not reach to any admission as to what the contract was.

The question at issue in one aspect was whether the defendant received the supplies as agent or as purchaser. The fact that they were charged to him on account is not decisive and was for the jury to pass upon. That might have been found to be a matter of bookkeeping for convenience in keeping track of them. There are several circumstances which appear to support the claim of the defendant that he was agent and not purchaser. The supplies were shipped and charged to him in the same way as were the machines, but both sides agree that the machines were sent to him as agent and not as purchaser. They were all invoiced to him at the gross price less "his commission." Commission is not used in a proper sense as to goods sold directly to a consignee. Discount is the natural word to use in such connection, while commission correctly decribes that which an agent receives on sales. It further appeared that in some instances customers in the defendant's territory dealt directly with the corporation, and in these cases it paid to the defendant the same commission he would have received had he secured the customer himself. Letters from officers of the corporation speak of the defendant as its agent. The conversation between the defendant and the president and directors of the corporation at the time of his appointment as manager for Vermont and New Hampshire may have been found to amount only to an agreement on his part to make advances on account of supplies sent him so that the corporation would not be crippled by running two supply stations, which did not modify the general agency relation, and did not constitute an agreement to purchase.

In view of these considerations it could not have been ruled rightly as matter of law that there was no evidence to support the defendant's contention as to what the contract was. The nature of the relation was a question of fact.

Exceptions sustained.

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ELEANOR C. ASHLEY & others *vs.* ROBERT L. WINKLEY & another, trustees.

Suffolk. March 20, 1911. — June 29, 1911.*

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Trust, Accounting by trustee, Trustee's duties as to preservation of trust property, Liability of co-trustee. *Equity Jurisdiction*, For an accounting, Plaintiff must have "clean hands." *Evidence*, Presumptions and burden of proof.

In a suit in equity by a beneficiary under an express trust against the trustee for an accounting, the burden is upon the defendant to show that in the discharge of his duties he has exercised reasonable skill, prudence and judgment.

A suit in equity by the beneficiaries of a real estate trust against the trustee for an accounting was referred to a master, who found the following facts: The trust property consisted of a hotel which for a number of years had been leased to a tenant who, about six years before the commencement of the suit, had become $20,000 in arrears in his rent. About a year later, the tenant being still in arrears about $19,000, the trustee dispossessed him. Shortly thereafter the tenant died insolvent. The trustee then placed a manager in the hotel to run it on behalf of the trust. In doing so, certain furniture which had been used by the tenant was taken possession of by the trustee. A liquor license under which the tenant had operated the hotel had been issued in the name of his wife. Of $60,000 worth of furniture which he had used in the hotel, $56,000 worth had been purchased by him subject to a right of the vendor to resume possession on non-payment of the purchase price, of which the tenant owed $12,000 at the time of his death. The widow of the tenant claimed title to the rest of the furniture, and, "on advice of able and competent counsel," the trustee settled her claim by paying her $4,000. At the hearing before the master the trustee gave no other explanation of his action. *Held*, that upon the findings of the master it did not appear that the settlement with the tenant's widow was so injudicious or unwarranted that the trustee should be charged personally with the amount he paid her.

A suit in equity by the beneficiaries of a real estate trust against the trustee for an accounting was referred to a master, who found the following facts: The trust property consisted of a hotel which about six years before the commencement of the suit was held by a tenant who was $19,000 in arrears in his rent. Friends of the tenant then took charge of the hotel and ran it with the tenant as manager until he died, hopelessly insolvent, when the trustee placed a manager in charge and ran it for the trust. In doing so, he took possession of certain supplies which belonged to the tenant's friends. The friends owed the trust for rent $3,933, and, upon their making claim upon the trustee for the supplies of which he had taken possession, he settled with them by paying to them $2,810. The entry in the trustee's cash book was "Supplies and equity all that" the

* The opinion in this case was withdrawn on an application for a rehearing. This was denied on September 5, 1911, when the opinion was returned to the Reporter.

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tenant's friends "owned, $2,810." What the value of the supplies was did not appear. The only explanation given by the trustee of his action was that he acted in accordance with the advice of able and competent counsel. *Held*, that upon the findings of the master it did not appear that the settlement with the tenant's friends was so injudicious or unwarranted that the trustee should be charged personally with the amount he paid them.

A suit in equity in the Superior Court by the beneficiaries of a real estate trust against two, who were the trustees, for an accounting was referred to a master who found the following facts: The trust property consisted of a hotel in Boston worth about $500,000. Under the trust instrument shares were issued to the beneficiaries to represent their interests in the trust. The owner of a majority of the shares, one P, who was not a party to the suit, had procured the appointment as one of the two trustees of his confidential secretary and bookkeeper, who did not appear to have been possessed of any knowledge as to the duties of a trustee or to have had any experience in the management of real estate, and who "must have regarded this service only as one of the many which he was employed to render to" P "and for which he looked to" P "for compensation." He became the managing trustee. The other trustee was old and partially blind. Neither trustee had any other interest in the trust than as trustee. Five years before the commencement of the suit the trustees had dispossessed a tenant who had been in possession of the hotel for many years and who was $19,000 in arrears in rent, and, being unable to find a new tenant, had placed a manager in charge to run the hotel for the trust. In doing so they had taken possession of the furniture which had been used by the tenant. All but $4,000 worth of this the tenant had procured at a price of $56,000, subject to a right of the vendor to resume possession on non-payment of the purchase price, on which he had paid $44,000. For failure of the tenant to pay the entire purchase price the vendor then took possession of the furniture and claimed title to it. The managing trustee was absent from the Commonwealth on P's business and the master found that "The furniture matter was, as might have been expected, handled by P." The remaining $4,000 worth of furniture was claimed by the tenant's widow, and, under advice of competent counsel, the trustees paid her that amount. They then conveyed that furniture to P for $5,000. He purchased the other furniture from the vendor for $12,000. At a later date, when the trustees had found a tenant, P sold the furniture to the tenant for $9,000 and made a claim upon the trustees for the $8,000 actual loss on his advances and for $400 a month for thirteen months during which the trustees had used the furniture in the hotel under their own management. The trustees paid the amount demanded, and later signed a paper, antedated to correspond with the date of the transaction and purporting to be a vote by them to make the payment in accordance with a previous oral contract under which the new tenant was procured and "to reimburse" P "for his loss sustained in behalf of the" trust property "in the sale of the furniture, and for the use of the same." The master found that the payment of $8,000 to P to reimburse him for cash lost in the transaction was warranted, but that the payment of $400 a month for the use of the furniture was unwarranted, five per cent on the amount invested being sufficient. The defendants excepted to the master's findings. The judge of the Superior Court overruled the exceptions, and the defendants appealed. *Held*, that the trustees should be charged in accordance with the master's report.

Ignorance on the part of a trustee of an express trust as to the scope of his duties or as to the legal requirements of his office does not free him from liability for

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losses sustained by the trust by reason of a breach of such duties on his part or a failure to fulfil the requirements of his office.

A suit in equity by the beneficiaries of a real estate trust against two, who were the trustees, for an accounting was referred to a master who found the following facts: The trust property consisted of a hotel in Boston worth about $500,000. Under the trust instrument shares were issued to the beneficiaries to represent their interests in the trust. The owner of a majority of the shares, one P, who was not a party to the suit, had procured the appointment as one of the two trustees of his confidential secretary and bookkeeper, who did not appear to have been possessed of any knowledge as to the duties of a trustee or to have had any experience in the management of real estate, and who "must have regarded this service only as one of the many which he was employed to render to" P "and for which he looked to" P "for compensation." He became the managing trustee. The other trustee was old and partially blind. Neither trustee had any other interest in the trust than as trustee. The trust property was subject to a first mortgage for $250,000 and a second mortgage for $50,000. The second mortgage had been held by a former trustee. It came due about the time that P procured the election as trustee of his nominee. The managing trustee "did not realize that" the mortgage "ought to be paid," and no effort was made to renew it. The original mortgagee having died, the mortgage had been assigned by his son, who had succeeded to the mortgage title, to a stranger to the trust without the knowledge of the trustees and the assignment was not recorded for some years. After it had been overdue for about five years a financial panic occurred and the assignee demanded payment. Both the trustees and P and the original mortgagee's son sought funds with which to save the property from a sale. The mortgagee's son found one who offered to lend the necessary amount although he demanded a bonus of $5,000 and twelve per cent interest per year. This offer was communicated to both trustees. The managing trustee and P and their personal counsel considered what should be done without consulting with the other trustee and, without informing him, decided to attend the sale, to bid the property up to about $80,000 above the first mortgage, and then to let it go. They did so and the property was sold for $77,250 above the first mortgage. In the transaction, the managing trustee not only "kept" his co-trustee "in the dark, but . . . actually misled" him. The property was worth $100,000 more than it was sold for. *Held*, that both trustees were personally chargeable for the $100,000 thus lost.

Although one of two trustees of a real estate trust is not responsible for acts or misconduct of a co-trustee, who is the managing trustee, in which he has not joined or to which he does not consent or which he has not aided or made possible by his own neglect, he is chargeable for losses resulting from his failure to inform himself of business transactions involved in the execution of the trust even if he is deceived and purposely kept uninformed by the managing trustee, because he cannot properly discharge his duty by surrendering the substantial or entire control of the trust to the managing trustee, and this is especially true where with the co-trustee's knowledge the managing trustee is entirely under the control of the owner of a majority of the interest of the beneficiaries and is used by such owner to further his own ends at the expense of the trust.

In a suit in equity by several of the beneficiaries of a real estate trust against the trustees for an accounting, in which the defendants were held to be liable for a loss sustained by the trust by reason of a sale during a financial panic of the property of the trust in foreclosure of a second mortgage which should not have been allowed by the trustees to become overdue, it appeared that about ten years

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before the sale the mortgage had been held by a former trustee of the trust and that shortly thereafter the mortgagee had died and the mortgage had become overdue. Both trustees thought that the mortgage continued to be held by one of two sons of the original mortgagor, who had succeeded to his father's title, and checks to pay interest had been sent to the son. About five years before the foreclosure, the mortgage had been assigned by the son to a stranger to the trust. The trustees had not been informed of the assignment and it was not recorded for some years. One of the plaintiffs was a corporation, shares in which were owned or controlled equally by the two sons of the original mortgagor. *Held*, that the corporation was not estopped from sharing in the distribution of the amount recovered in the suit because of the action of the owner of one half of the shares of its capital stock.

In a suit by several beneficiaries of a real estate trust against the trustees for an accounting, it appeared that shares were issued to the beneficiaries in proportion to their investments therein, and that the trust had suffered losses by reason of neglect and mismanagement on the part of the trustees which were participated in and in the main caused by one P, the owner of two thirds of the shares of the trust. *Held*, that the defendants should pay to each of the plaintiffs such a portion of the loss sustained by the trust as his shares bore to the total of the shares issued; but that the trustees should not be charged with the proportion of the loss represented by shares formerly owned by P.

BILL IN EQUITY, filed in the Superior Court on May 14, 1908, by the beneficiaries under an express trust, called the "Copley Square Hotel Trust," against those who then were trustees thereunder, Robert L. Winkley and Frederic Pope, for an accounting.

The case was referred to Robert D. Weston, Esquire, as master.* In his report he stated, among other facts, that the declaration of trust was dated January 22, 1892; that the trust property included about eleven thousand square feet of land on the corner of Huntington Avenue and Exeter Street in Boston and a hotel building thereon, of a value between $500,000 and $600,000. The original trustees were Frederic Pope, George T. Sheldon and Lewis F. Perry.

When the property was conveyed to the trustees it was subject to a first mortgage for $225,000 and a second mortgage for $75,000. These were discharged and succeeded by a first mort-

* The reference to the master was on October 21, 1908. On September 14, 1910, the plaintiffs moved to amend the bill by adding allegations that Albert A. Pope had deceased since the filing of the bill, by including the executors of the will of Albert A. Pope as defendants and by seeking relief against the estate of Albert A. Pope. The motion was denied on September 20, 1910. The plaintiffs did not appeal from the denial of the motion. The master's report was filed on November 12, 1910.

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gage to the Provident Institution for Savings for $250,000, and a second mortgage for $50,000 to Sheldon, one of the trustees.

Trust certificates for $200,000, the value placed on the equity, were issued in accordance with the provisions of the trust instrument to various persons. When the trust was first established Frederic Pope held shares to a nominal value of $75,000 or $80,000. These he pledged in the year 1896 to his cousin Albert A. Pope in order to secure a debt and, in 1897, in order to satisfy that and other obligations, he transferred to his cousin all his shares absolutely. Since then Frederic Pope has had no title to any shares. As a result of these transactions, on July 19, 1897, Albert A. Pope held shares to the nominal value of $133,409, or a little over two thirds of the total value of all the shares. This gave him power under the terms of the trust to remove any trustee and to appoint a new trustee in his place, to fill vacancies in the number of the trustees and to terminate, alter or amend the trust.

The next largest shareholder was George T. Sheldon, one of the trustees, who held shares to the nominal value of $52,870. Until the appointment of Winkley as a trustee in July, 1897, Sheldon was the managing trustee. His death occurred a few years thereafter. At the time of his death he owned shares in the trust amounting to $58,340. In 1905 Sheldon's certificate for $52,870 was delivered to the International Trust Company "as general collateral for any liability" of Royal R. Sheldon. Royal R. Sheldon was a son of George T. Sheldon and the executor of his will. Subsequently, on May 27, 1907, the International Trust Company caused this certificate to be transferred into the name of one of its officers, B. Farnham Smith, in whose name it stood at the time of the hearings before the master. On May 31, 1907, Royal R. Sheldon undertook by bill of sale to transfer to the Sheldon Corporation any title which he or the estate of George T. Sheldon owned in such shares. The Sheldon Corporation was formed by Royal R. Sheldon and his brother George H. Sheldon, (the only persons interested in the estate of George T. Sheldon,) to take over and hold the assets of the George T. Sheldon estate. The two brothers owned all the stock of said corporation in equal shares except one other share which was given to a third person in order to enable them to

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form the corporation. The transfer of whatever title the Sheldon estate had in the Copley Square Hotel stock, represented by the three certificates aforesaid, was made to this corporation as part of the general transfer of the assets of the estate.

As to the appointment of Robert L. Winkley as a trustee, the master found that Winkley was the person against whom the plaintiffs have directed their attacks, and that "If Frederic Pope is liable for anything which the trustees have done or failed to do it is only upon technical grounds." Winkley was appointed a trustee and accepted the trust on July 22, 1897. Lewis F. Perry, one of the original trustees, had resigned shortly after the establishment of the trust, leaving a vacancy which it had not been thought worth while to fill until Albert A. Pope acquired a "controlling interest" as above described and wished to appoint Winkley. Winkley was Pope's confidential secretary and, as he himself expressed it, he was appointed "because of the interest acquired in the trust by my employer Colonel Albert A. Pope." George T. Sheldon and Frederic Pope and one other shareholder co-operated with Albert A. Pope in effecting Winkley's appointment. Under a power given by the trust instrument, Winkley was employed by himself and Frederic Pope as agent or manager of the trust estate and to do the work of keeping the records and accounts of the trust, and $300 was fixed as his compensation, which the master characterized as "of course, grossly inadequate in view of the responsibility imposed upon him." The master's finding continues: "He had no pecuniary interest whatever in the property. It is obvious that whatever duties he performed as trustee of the Copley Square Hotel were performed for the most part merely as the agent and servant of Colonel Pope. He must have regarded this service only as one of the many which he was employed to render to the Colonel, and for which he looked to the Colonel for compensation. It was, so to speak, a part of the day's work in an employment which had existed for some years before he was appointed trustee and continued to exist till after the property was sold by the second mortgagee in the early fall of 1907. This relation between Colonel Pope and Winkley goes far to explain many things which happened later.

"However competent Winkley may have been as a confiden-

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tial secretary and bookkeeper, it did not appear that he possessed any knowledge as to the duties of a trustee or that he had had any experience in the management of real estate. Frederic Pope, Winkley's co-trustee, had ceased to have any interest in the property. At the time of Winkley's appointment Frederic Pope was about sixty years of age. As late as 1901, he was able as architect to build a hotel in Providence, but soon after that his eyesight failed. He testified that it had been many years since he had been able to read any paper or legal document. Except for this infirmity he appeared to be much more capable of managing a piece of real estate like the Copley Square Hotel than his colleague Winkley. But at the time when difficulties arose, as they did in 1902, his efficiency as a trustee was already greatly impaired by his loss of sight. . . .

"It would be difficult to conceive of two trustees more poorly situated or qualified to handle the property in their charge during the five years extending from October, 1902, to October, 1907, than were Robert L. Winkley and Frederic Pope."

In 1901 one Risteen was a tenant of the property and for the previous five years he had been regular in the payment of rent. On January 1, 1901, there was a balance due from him of $700, which increased until at the end of the year he was in arrears $20,000. On February 1, 1903, he owed the trustees about $19,000. In 1902 the defendant Winkley went to New York on business for Albert A. Pope and lived there for about three years, when he went to Hartford for the same employer and lived there for about two years.

Friends came to Risteen's support and formed or started to form a corporation called the Copley Square Hotel Company to run the hotel with Risteen as manager. Some oral agreement was made with the company to permit it to occupy the hotel and pay rent at the rate of $100 a day. This arrangement continued from February 1 till April 22, 1903, when nominally it was terminated although to all intents and purposes it was terminated earlier by the sickness and death of Risteen, on whom the whole scheme depended, at some time in April, 1903. On March 27, 1903, Frederic Pope had entered for the trustees in order to terminate the Risteen lease. If the Copley Square Hotel Company was really responsible for the rent at the rate of $100 a day

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from February 1 to April 22, inclusive, (81 days,) it owed the trustees $8,100. With this amount the company was charged on the trustees' books. When its occupancy terminated this amount had been reduced by payments so that $3,933.05 was the balance due on the account. The trustees took possession of certain furniture which Risteen formerly had used and of certain supplies belonging to the company, which were in the hotel when the company went out, and which were the subject of settlements made later, of which the plaintiffs complained, and which are referred to in the opinion as the subject of the defendants' first, second and third exceptions to the master's report.

The trustees being without a tenant after April 22, 1903, tried in vain for several weeks to find one. In May they put a man named Sturgis into the hotel to run it as their manager until a tenant could be found.

The report continues: "The furniture in the hotel had for the most part been bought by Risteen of John H. Pray and Sons Company. Some of it was then or later claimed by Mrs. Risteen. Whether the title to the furniture which Risteen had bought of Pray had actually passed to Risteen and a mortgage had been given back to secure payment, or whether it had been leased to Risteen under a contract which provided that the title should not pass until the purchase price had been paid, did not appear. However this may have been John H. Pray and Sons Company had a right to foreclose or take possession of the greater part of the furniture in the house.

"The hotel liquor license stood in the name of Mrs. Risteen. What arrangement, if any, was made with her by the trustees as to the use of the license did not appear. The trustees paid the usual license fee ($1,000) on April 30, 1903. Nothing was done about a transfer of the license until the following spring. Whether the trustees then obtained a transfer of Mrs. Risteen's license or got a new one did not appear. . . .

"The furniture matter was, as might have been expected, handled by Albert A. Pope. Pray and Sons wanted their money and arranged with him to have him pay what was still due them from Risteen. Pray and Sons foreclosed or took possession of the furniture. Pope paid them $12,035.07 and took title from them

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to all the furniture which Risteen had bought of them. This payment was made on June 29, 1903. Mrs. Risteen's claim that she was the owner of part of the furniture in the hotel, if it had been made at this time, was left in abeyance. Her claim was not settled until the following January (1904). At some time between Risteen's death and January, 1904, such a claim was made. An inventory of all the furniture in the hotel was taken. It was also appraised. Outside of the furniture which Albert A. Pope bought of Pray other furniture was found to an appraised value of over $4,000. This Mrs. Risteen said belonged to her personally. How Mrs. Risteen acquired her title did not appear. All the defendants proved was that she claimed to be the owner, that they employed able and competent counsel to represent them in the person of William F. Garcelon, Esquire (who was recommended for engagement as attorney by the defendant Frederic Pope, and was recommended to Frederic Pope by Charles H. Tyler, Esquire, whom Mr. Pope had originally asked to undertake the matter), and that he advised them to make the settlement with her which they finally made. The plaintiffs contended that for aught that appeared the property had belonged to Risteen, whose estate owed the trust over $19,000, that the trustees really knew nothing to the contrary and that the settlement should not have been made. At any rate the plaintiffs said that it had not been sufficiently justified or explained. Nothing was ever collected by the trustees from Risteen's estate, which was undoubtedly insolvent. When it came to the actual settlement with Mrs. Risteen two bills of sale of 'all right, title and interest' in 'the furniture, fixtures, housekeeping goods and personal property' in the hotel were given; one by her personally and the other by her as executrix of her husband's will, and the check for the purchase money ($4,189.83) was paid by a check to her order as executrix. The entry in the cash book was 'Furniture and all owned by Susan M. Risteen Ex.' Winkley testified that the trustees were advised by counsel that the property transferred belonged to Mrs. Risteen and that they took a bill of sale from her as executrix merely as a precautionary measure. Both bills of sale stated the consideration to be one dollar and other valuable considerations. The payment was made January 22, 1904. In this connection

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it perhaps ought to be stated that Risteen had paid Pray and Sons between September 3, 1891, and October 31, 1902, on account of the furniture which Albert A. Pope had bought of them $44,667.92, and that the $12,035.07 which Albert A. Pope paid Pray and Sons was the balance remaining due on the account. It may be conjectured that some claim to this furniture was advanced on behalf of Risteen's estate and figured in the settlement made in January with Mrs. Risteen. But nothing of this kind was suggested in the evidence of the defendants. In the settlement with Mrs. Risteen, Albert A. Pope again came to the assistance of the trustees. On the day the money was paid to Mrs. Risteen (January 22, 1904) he paid the trustees $5,000, out of which they made the payment and in consideration for which the trustees transferred to him whatever title they acquired from Mrs. Risteen.

"As a result of these transactions Colonel Pope became the owner of all the furniture, fixtures and housekeeping goods in the hotel and had paid therefor on June 29, 1903, $12,035.07, and on January 22, 1904, $5,000, a total of $17,035.07. It was later (August, 1904) all sold to the new tenant of the hotel, Amos H. Whipple, for about $9,000.

"Simultaneously with the settlement made with Mrs. Risteen personally and as executrix another settlement was made by the trustees. They paid the Copley Square Hotel Company $2,810.17. In the cash book the entry reads 'Supplies and Equity all that Copley Co. owned $2,810.17.' This was said to represent the stock of wines, liquors, cigars and provisions left in the hotel by the company when the trustees took possession in the spring of 1903. What their value was did not appear. Why the trustees were paying this money to the company when according to the trustees' books the company owed them $3,933.05, was not explained. The only explanation or justification offered by the trustees was that they paid the money under the advice of counsel whom they had employed to investigate the matter and advise them. Their counsel was Mr. Garcelon. He was not called as a witness.

"In the meantime the hotel was still being run by the trustees with Sturgis in charge as their manager. The hotel was not profitable and no dividends were being earned for the share-

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holders. The trustees had never regarded the Sturgis management as anything but a temporary arrangement. From the beginning they were trying to find a new tenant."

In August, 1904, the hotel was leased to Amos H. Whipple. In order to secure the tenant, or at least to facilitate the negotiations, Albert A. Pope sold him the furniture for $9,000, thereby sustaining a cash loss of $8,000 on the whole transaction. Albert A. Pope then "decided to charge $400 a month for the use of the furniture," and in accordance with his wishes the trustees gave him a note dated September 30, 1904, for $13,000, payable one year after date, covering the $8,000 lost through the sale to Whipple and $5,000 for rental of the furniture. This note the trustees ultimately paid with interest at the rate of five per cent. At some time after October 7, 1904, acting under advice of Benjamin D. Hyde, Esquire, the trustees signed *nunc pro tunc* a paper dated September 30, 1904, the day the note had been given, stating that "at a regularly called meeting of the Trustees," it was voted in substance that, "Whereas Colonel Albert A. Pope" had made a verbal agreement with the trustees to sell the furniture to Whipple at a loss provided they would reimburse him for that loss and in addition would pay him "a reasonable sum for the use of said furniture during the time that we, as Trustees, were operating this hotel property," it was voted: "That, We, the trustees of the Copley Square Hotel Trust, do hereby give to said Albert A. Pope trustees' notes to the amount of $13,000 to reimburse him for his loss sustained in behalf of the Copley Square Hotel property in the sale of his furniture therein and for the use of the same; hereby carrying out the verbal contract we made with said Pope at the time the lease was executed with Amos Whipple." The master finds: "This posthumous record of an imaginary meeting was signed by both trustees. I find that it was reasonable and proper for the trustees to reimburse Colonel Pope for the difference between the price that he had paid and the price that he had sold. I also find that he was entitled to a reasonable rate of interest on the two advances which he had made on behalf of the trust. But I find and rule that it was not proper to pay him $400 a month for the use of the furniture and that five per cent per annum, the rate which he charged on his note would have been reasonable interest for the trustees

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to allow him on his advances. Colonel Pope's relation to the trust and to Winkley was such that he would not have been justified in demanding and the trustees were not justified in paying a larger rate of interest. Allowing the loss measured by the difference between the purchase and selling price, $8,000, and adding thereto interest on his two payments from the dates when they were made to September 30, 1904, . . . I find that on account of this transaction the trustees are chargeable with $4,000 and with interest thereon from September 30, 1905."

The second mortgage of $50,000 to George T. Sheldon, previously referred to, came due at about the time that the defendant Winkley became a trustee. Neither he nor the defendant Pope did anything about it for several years. The master's report states: "Winkley, the managing trustee, did not realize that the mortgage ought to be either paid or renewed or extended so that the mortgage debt would be payable at a definite time. To be sure, both trustees supposed that the note was in the hands of Royal R. Sheldon who held it either personally or as his father's representative. He likewise held a large interest in the shares of the trust and was friendly to the trustees. On the other hand, Sheldon was under no obligation not to assign the note and mortgage and for aught the trustees knew might do so at any time. He had in fact assigned it to one McQuesten on July 2, 1902, without informing the trustees that he had done so. This assignment was not recorded until August, 1906, but the recording was of no significance because the trustees had no occasion to examine the title and had no actual notice. Notwithstanding the assignment, Royal R. Sheldon received the trustees' checks for the interest and turned them over to McQuesten. The last interest was paid to Sheldon on April 12, 1907. Shortly before this McQuesten had asked Winkley to pay the interest to him as assignee of the mortgage, but Winkley disregarded this request and wrote McQuesten that the mortgage stood in Sheldon's name. McQuesten then wrote to Winkley again, April 11, 1907, telling Winkley that he was mistaken and giving him the date of the assignment and a reference to the book and page in the registry where he could find the record. Sheldon turned over the check which he had received to McQuesten and Winkley's mistake as to who held the mortgage did no

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harm. The information that the mortgage was in the hands of McQuesten caused Winkley no uneasiness. He made no effort to pay, renew or extend it. He did not even inform his co-trustee of the assignment. He in fact attached no importance to the matter. It never occurred to him that if money became scarce and hard to borrow McQuesten would probably demand the payment of the mortgage note and that at the same time it would probably be very difficult for the trustees to borrow $50,000 on a second mortgage of a rather unsuccessful hotel already subject to a first mortgage of $250,000.

"The panic of 1907 began and just what Winkley ought to have anticipated and guarded against happened. McQuesten demanded the payment of the principal long since overdue and behind his demand were his right to foreclose and his power of sale. . . .

"In this respect I find that Winkley failed to exercise the care and prudence which the law demands of a trustee in his position. His ignorance does not excuse him. Frederic Pope, although he was not the active trustee and although he probably gave no thought to the second mortgage, knew that it was overdue, knew that Sheldon might assign it and that payment might be demanded at any time. He testified that he supposed Winkley had attended to it, but if he had thought about it at all he would have realized that Winkley could not have discharged or extended it without the execution of papers by his co-trustee. So far as this second mortgage is concerned, I find that the defendant Pope did not exercise such supervision as the law demands of a trustee, and is responsible with Winkley for the loss which the beneficiaries sustained because of Winkley's failure to take proper care of the second mortgage."

The mortgagee caused the property to be advertised for sale at auction, the sale to take place on August 17, 1907, and a deposit of $1,000 to be required of the purchaser. Winkley caused a straw bidder to attend the sale, bid in the property and pay the deposit, hoping that before the purchaser was called upon to complete his purchase, or before the property could be advertised and sold again, the trustees might find some one who would lend the money. No lender was found, however, within the time fixed for the completion of the sale and the property again was

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advertised to be sold. The report continues: "This second sale was to take place on September 19, and this time a deposit of $5,000 was required. The trustees tried to raise money in every way they could think of. Under ordinary circumstances Albert A. Pope might have been expected to save the property. Although for about two years he had been in ill health and unable to give much attention to business, he had for many years been a man of large financial resources. Now he was financially embarrassed. About this time his company went into the hands of a receiver and he had to call a meeting of his personal creditors and ask for an extension. But a number of his friends were approached on behalf of the trust. . . . Agents were also employed to see possible lenders. But no one could be found. Frederic Pope was also interviewing or approaching in one way or another every possible lender that he knew, but was no more successful than Winkley and the Colonel.

"Sheldon was also engaged in the same pursuit and was the only man who found a person who would lend the money on any terms. This was Mr. Rollin H. Allen who told Sheldon in a conversation a day or two before the second sale that he would lend the amount required, up to $50,000, and would pay the $5,000 to be deposited at the sale. For this he demanded a six months' mortgage which he said he would be willing to renew for a further six months if the trustees desired such renewal, a bonus of $5,000 to be paid in cash or added to the amount of the mortgage note and interest at the rate of one per cent a month or twelve per cent per annum. I find that Allen was able and willing to carry out his agreement with Sheldon. Sheldon reported this offer of Allen's to Frederic Pope and to Winkley the day before the sale."

On the morning of the sale there was a meeting at the office of M. F. Dickinson, Esquire. Mr. Dickinson, who had been retained after the first sale, was acting as counsel for Albert A. Pope and Winkley. The meeting was held in Mr. Dickinson's private office. There were present Albert A. Pope, Winkley, Mr. Dickinson and his associate Mr. Williston. Frederic Pope and Royal R. Sheldon were on hand but were not admitted to the inner office and had no part in the conference which took place there.

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During the discussion in the inner office, the fact that Sheldon had been negotiating with Allen for a loan was mentioned, and Mr. Dickinson sent Winkley out to talk with Sheldon and find out whether Allen had made any definite offer. Winkley went out and talked with Sheldon and Pope. What was said in this conversation was in dispute, Sheldon and Frederic Pope testifying in substance that Winkley was told that Allen was ready to lend the money and on what terms, and Winkley testifying that Sheldon said that he had no definite proposition. At any rate Winkley returned to the inner office and reported that Sheldon had nothing definite from Allen and Mr. Dickinson remarked "I thought so," and it then was decided to bid the property up to about $80,000 above the first mortgage and let it go to any purchaser who would bid that amount. This conclusion reached in the inner office was not communicated either to Sheldon or to Frederic Pope. They both went away together thinking that some plan had been devised for preserving the property, and that it was to be bid in by the trustees or in their interest.

The report continues: "Mr. Dickinson took charge of matters at the sale for Colonel Pope. Finally a bid was made for Amos H. Whipple of $77,250 above the first mortgage. The bidding had been going slowly and Mr. Dickinson was afraid that if he bid more he would get the property and $4,200, advanced by Albert A. Pope toward an amount which might be required as a deposit, would be in jeopardy. Their purpose had been substantially accomplished and Whipple secured the hotel for $327,250 subject, of course, to the first mortgage.

"I find that in ordinary times the hotel was worth for purposes of sale $100,000 more than the price which it brought at this forced auction sale made in the midst of the panic of 1907. It is obvious now, and I think must have been obvious then, that it would have been much better business judgment to have paid Allen his $5,000 bonus and his twelve per cent interest than to let the equity of the shareholders be wiped out as it was. If Winkley had been acting as an independent and responsible trustee doing all in his power to protect his beneficiaries he would at least have seen Allen himself. Allen was in his office not five minutes' walk from Mr. Dickinson's office. The only explanation

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for his conduct appears to be that he found that Colonel Pope was willing to let the property go at or about the figure determined on in the conference. If Colonel Pope was satisfied Winkley was satisfied. As to the report which he made to the inner council of the conversation which he had with Sheldon, I find that it was honestly made. He probably thought that a mere oral proposition was not one on which they could act. He was ignorant about such matters. Things seemed satisfactory to Colonel Pope without more and the confidential secretary was content to let Colonel Pope and his counsel act as they saw fit. Forceful initiative was not characteristic of the man.

"I find that in not pursuing Allen and availing himself as trustee of the means of saving the property which Allen stood ready to supply, he failed in his duty as trustee.

"So far as this part of the business is concerned I cannot see how any blame can be attached to Frederic Pope. He was not only kept in the dark but he was actually misled by his co-trustee. Even when it was known that Whipple had bid in the property Frederic Pope and Sheldon supposed for some days that it had been bought in for the trustees under some arrangement made by Mr. Dickinson with Whipple. They could not believe that Allen's offer had been rejected by the conferees unless they had devised some other plan for preserving the interest of the shareholders.

"As to this loss of $100,000, caused by the foreclosure sale, I find that Colonel Pope assented to and virtually directed the sale. Winkley was a mere agent and tool of Colonel Pope throughout the whole affair. The trustees should not be charged with the proportion of the loss represented by Colonel Pope's share."

The defendants filed the following exceptions to the master's report:

"1. To the refusal of the master to find or rule that the defendants acted with reasonable care and discretion in making the settlement that they did, as shown by the master's report, with Mrs. Risteen.

"2. To the refusal of the master to find or rule that the defendants acted with reasonable care and discretion in making the settlement that they did, as shown by the master's report,

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with Colonel Albert A. Pope, in regard to the furniture of the Copley Square Hotel.

"3. To the refusal of the master to find or rule that the defendants acted with reasonable care and discretion in making the settlement that they did, as shown by the master's report, with the Copley Square Hotel Company.

"4. To the refusal of the master to find or rule that the defendants acted with reasonable care and discretion in allowing the Copley Square Hotel to be sold at auction, as it was sold, as appears by the master's report.

"5. To the refusal of the master to find or rule that if the defendants in permitting the Copley Square Hotel to be sold at auction, acted under the direction of the owners or owner of more than two thirds in value of the shares of the Copley Square Hotel Trust, the defendants are under no liability.

"6. To the refusal of the master to find or rule that on all the facts the defendants have committed no breach of legal duty."

The case was heard by *Hitchcock*, J., who sustained the defendants' first three exceptions and overruled the last three; and a final decree was entered which in all other respects was in accordance with the master's report. Both the plaintiffs and the defendants appealed.

G. F. Ordway, for the plaintiffs.

S. Williston, (*M. F. Dickinson & C. Dickinson* with him,) for the defendants.

BRALEY, J. The defendants are trustees under an express trust, and in accounting for their administration of the property which they admit that they have received, the burden is on them to show that in the discharge of their duties they have exercised reasonable skill, prudence and judgment. *Andrews* v. *Tuttle-Smith Co.* 191 Mass. 461. *Pine* v. *White*, 175 Mass. 585. *Little* v. *Phipps*, 208 Mass. 331. If we examine the allegations of the bill, they are charged with having failed to protect the property from foreclosure of a second mortgage whereby the equity of redemption was lost, and generally that they grossly neglected their duties, entailing great pecuniary loss to the plaintiffs in common with other beneficiaries and shareholders. But in the report of the master to whom the case was referred, the transactions which the plaintiffs contended were imprudent

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and unjustifiable are specifically stated and reviewed. The trust estate when conveyed consisted of the Copley Square Hotel, with the appurtenant land, upon which were mortgages for $300,000. The equity of redemption, valued and capitalized at the nominal sum of $200,000, was divided into shares which if possible were not to be less than $100 each, for which certificates were issued in accordance with the provisions of the declaration or instrument of trust. By the death of one trustee and the resignation of another, only the defendant Frederic Pope of the original trustees remained, and at the request of Albert A. Pope, who had become the owner of two thirds of the shares, the defendant Winkley, with the consent of some of the other principal shareholders, was appointed to one of the vacancies, while the other vacancy remained unfilled. It was during the incumbency of Winkley that the transactions took place on which the plaintiffs rely as proof of a flagrant mismanagement of the estate. The evidence is not reported, and the master's findings as to Winkley's personal relations to Albert A. Pope, and the reasons for his appointment, and Pope's control of Winkley, and through Winkley of the management of the trust are not only important, but should not be reversed unless clearly wrong. It is only when these relations are understood, that the unfortunate conduct of the trustees becomes intelligible. The report states, that this defendant was his confidential secretary and bookkeeper and became trustee because of the large interest which his employer had acquired while the defendant Frederic Pope was the cousin of Albert A. Pope, to whom he was beholden for financial assistance at various times. The master concludes, that in administrative capacity the trustees, and especially Winkley, were not well qualified to administer the trust, and that his double employment "goes far to explain many things which happened later." It appears that from Winkley's accession to the day of the foreclosure the influence of Albert A. Pope was dominant in all important business affairs with which the trustees dealt.

The very full statements relating to the defendants' first and third exceptions need not be reviewed. The master reports the facts, but does not decide the question of liability. If when the defendants took possession of the premises for the purpose of

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terminating the lease of their tenant one Risteen, or the occupancy of his successor, the Copley Square Hotel Company, and while seeking for a new tenant carried on the business, they also took and used supplies which were in the hotel, and furniture belonging to the tenant's wife, they were accountable to the owners for their value. The settlements arranged with them upon the advice of competent counsel do not appear to have been so injudicious and unwarranted that the defendants should be personally charged with the amounts paid. *Pine* v. *White*, *supra*.

But the payment to Albert A. Pope of $5,200 for thirteen months' use of the furniture, stands upon a different footing. If under the circumstances it is assumed, that the trustees had implied authority to buy the furniture, fixtures and household supplies which were in the hotel, but permitted or requested Pope to act for the sole benefit of the trust as apparently he did, the master finds, that he had been fully reimbursed by the trustees for the loss sustained when he sold the property to their new lessee for a less sum than that which he paid. The trustees themselves were doubtful as to the propriety of recognizing his claim for rent. It was after their promissory note had been given in payment for the combined amount, that, acting under the suggestion of counsel, they signed an antedated paper with a preamble, and form of vote containing recitals, that the purpose of the note was, "to reimburse him for his loss sustained in behalf of the Copley Square Hotel property in the sale of the furniture, and for the use of the same." The master fittingly characterized their action as a "posthumous record of an imaginary meeting." It was ineffective as an act of ratification, for the payment was unauthorized, and his disallowance of this item was right and should not be disturbed. *Rowland* v. *Maddock*, 183 Mass. 360. *Hayes* v. *Hall*, 188 Mass. 510. *Andrews* v. *Tuttle-Smith Co.* 191 Mass. 461.

But the principal sum for which the plaintiffs seek to charge the defendants is the loss arising from the foreclosure of the second mortgage. The powers of the defendants are defined by the instrument under which they were appointed. By section 5, they were given discretionary authority to mortgage the estate, either to pay in whole or in part outstanding mortgages, or to

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renew them, and it is no excuse that they may have been ignorant of the scope of their duties or of the legal requirements connected with their office. *Pierce* v. *Prescott*, 128 Mass. 140, 145–147. The second mortgage became due either when Winkley became trustee, or some five years later and remained overdue, but "he made no effort to pay, renew or extend it," and "failed to exercise the care and prudence which the law demands of a trustee in his position." The findings which we have quoted were amply justified by the history of his management set forth at length in the report. Having taken no precautions to provide for a contingency which must occur if the mortgage was not paid, renewed or extended, a foreclosure followed extinguishing the equity of redemption, which the master valued at $100,000. If the foreclosure resulted from improvident management, the master further determined that the property even then could have been saved, if the trustees had acted promptly and judiciously. It would not be profitable, nor is it material, to recount the efforts which finally were put forth, or the participation of Albert A. Pope, who the master reports, "virtually directed the sale." But his findings, that a loan sufficient to have paid the mortgage could have been obtained and was offered to them upon terms which would have saved the property and should have been accepted, is proof of their further delinquency.

If there is no doubt that Winkley must be charged with the full amounts previously stated, the defendant Pope urges that he should be exonerated from all blame. It is well settled, that a trustee is not responsible for the acts or misconduct of a co-trustee in which he has not joined, or to which he does not consent, or has not aided or made possible by his own neglect. *Hayes* v. *Hall*, 188 Mass. 510, 514. Pom. Eq. Jur. (3d ed.) §§ 1081, 1082. The defendant was required to inform himself of the various business transactions involved in the execution of the trust. He could not properly discharge his duty by surrendering the substantial or entire control to Winkley, or delegate his authority to him, or to Albert A. Pope, or be indifferent, when the course of affairs was distinctly disadvantageous to the beneficiaries whose interests he had been selected to protect. But even if he is given the benefit of the master's finding, that Winkley misled and deceived him in the final attempt to preserve the property

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from foreclosure, his previous findings, that with knowledge of the transaction he assented to the payment for the use of the furniture and was responsible with his co-trustee for the loss sustained through their failure to provide for the payment or extension of the second mortgage, having been amply warranted, he cannot escape liability to the shareholders. *Stowe* v. *Bowen*, 99 Mass. 194. *Hayes* v. *Hall*, 188 Mass. 510. *Cunningham* v. *Pell*, 5 Paige, 607.

We may add, that, notwithstanding the defendants' contention that the Sheldon Corporation, which is one of the parties plaintiff, should not be permitted to recover, it is not estopped upon the facts reported from sharing in the distribution of the amounts which the defendants must pay, but, Albert A. Pope having participated in their misconduct, they should not be charged with the proportion of the loss represented by his shares. *Andrews* v. *Tuttle-Smith Co.* 191 Mass. 461, 468, and cases cited.

The result is, that the interlocutory decree must be modified by overruling the defendants' second exception to the master's report, and the final decree should charge the defendants with the sum of $100,000 with interest from September 19, 1907, and the additional sum of $4,000 with interest from September 30, 1905, and when so modified the decrees severally are affirmed, and the plaintiffs are respectively entitled to recover the amounts as therein specified.

Ordered accordingly.

NELLIE LYDON, administratrix, *vs.* EDISON ELECTRIC ILLUMINATING COMPANY.

Middlesex. March 14, 1911. — September 5, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Negligence, Due care of plaintiff's decedent, Causing death. *Death*.

An employee of a town in the course of his duties was in a tree within the limits of a highway destroying gypsy and brown tail moth nests. Through the tree ran three telephone wires and above them seven electric light wires, one of which, a primary wire which carried twenty-three hundred volts of electricity, had the insulation worn off from it in the tree. Before going into the tree the employee's attention had been called to the worn place on the wire. He went past and above the wire safely and, having completed his work, handed his tools

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down, and, as he was descending, asked a fellow workman whether the wire above described, pointing to it, "was a street light," and the fellow workman answered that he thought it was. The foreman on the ground, hearing the question and answer, told him that if it was "there is no current on." The employee then descended to a point below the wire. He was not seen alive again. Less than a minute later he was heard to groan and was found dead about a foot below the wire with his left arm extending above his head in a bent position and the inside of the tip of the third finger in contact with the wire at the place where the insulation was worn off. He was standing rigid, bent a little backward, with a spur which he wore on his right foot driven into a limb. In an action by his administrator against the electric light company which maintained the wire to recover for the death under R. L. c. 171, § 2, as amended by St. 1907, c. 375, it was *held*, without deciding whether there was evidence of negligence on the part of the defendant, that there was no evidence to warrant a finding that the employee was in the exercise of due care when he was killed, the manner of his death being left a matter of conjecture.

MORTON, J. While at work in the employ of the town of Winchester, destroying gypsy and brown tail moths in a tree at the corner of Mount Pleasant Street and Highland Avenue in that town, the plaintiff's intestate was instantly killed by reason of his left hand coming in contact, at a place where the insulation had been worn off, with an electric light wire running through the tree, and maintained by the defendant. This is an action under R. L. c. 171, § 2, as amended by St. 1907, c. 375, to recover damages for his death. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the presiding judge * to rule that upon all the evidence the plaintiff was not entitled to recover and to give certain other rulings that were requested, to the admission of evidence, and to certain portions of the charge.

It appeared that at the corner of Mount Pleasant Street and Highland Avenue there was a large pole on which were two cross arms. From the lower cross arm three telephone wires passed through the tree, and from the upper, seven electric light wires, including the one by which the plaintiff's intestate was killed. It was admitted that the electric light wires were controlled, maintained and operated by the defendant. It was also admitted that the tree was within the limits of the highway. The wires were parallel with Mount Pleasant Street, which ran east and west. The distance of the upper wires from the ground

* *Bond*, J.

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was variously estimated at from twelve to twenty feet more or less. The wire which the plaintiff's intestate came in contact with was the northerly wire on the upper cross arm. This was what was called a primary wire and carried twenty-three hundred volts, more than twice enough to cause instant death. Shortly before the accident the deceased had gone up into the tree for the purpose of destroying moths' nests. There was evidence tending to show that he went up till he was about a foot above the electric light wire, and that he was from fifteen to eighteen inches to one side and northerly of the wire which killed him and on the side next to the street. In going up he went one side of the wires and not through them so far as appeared. Before going up his attention had been called by the foreman to the place on the wire where the insulation was worn off, and he passed the wire safely in going up. Worn places on wires were not uncommon and the men were expected to look out for them and to warn each other. The evidence tended to show that after he had finished cutting off and painting the nests he passed down his cutting pole and the swab with which he had been painting the nests and prepared to descend along the limb where he was. While going down he asked one of the men, who was in the tree and back to back with him and about five or six feet away on the opposite side of the tree, whether he thought a certain wire was a street light and the man said he thought it was, and the foreman, who was on the ground and heard the question and answer, thereupon said that if it was "There is no current on." The man of whom the question was asked testified that the deceased pointed to the second wire and not to the one by which he was killed. But the jury might have found that he was mistaken and that the deceased pointed to the other wire, the one which killed him. At the time when he asked the question the deceased had descended several feet. This was the last time that he was seen alive. Shortly after, the time varying according to the witnesses from two seconds to half a minute or more, one of the men heard a groan and looking up saw the deceased about a foot below the wire with his left arm extending up above his head in a bent position and the inside of the tip of the third finger in contact with the wire at the place where the insulation was worn off. The deceased was standing rigid, bent

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a little backward, with the spur on his right foot driven into the limb. His hold on or contact with the wire was broken as soon as possible and he was taken down, but was found to be dead.

We assume in favor of the plaintiff without deciding that there was evidence of negligence on the part of the defendant.

The difficult question is whether there is any evidence warranting a finding that the plaintiff's intestate was in the exercise of due care. No one saw him when the accident that caused his death occurred. He had come down by the wire safely, just as he had gone up safely, and was a foot below it when in some entirely unexplained way the inside of the third finger of his left hand at the tip end of it came in contact with the wire. In order to make the contact he had to raise his hand about a foot above his head after, as we have said, he had come down safely by the wire. He was not required in the performance of any duty to examine the wire, and any presumption of due care which might have arisen in such a case is wanting. If, bearing in mind what had been said to him to the effect that if the wire was a street wire the current was not on, he chose to touch it for the purpose of testing the truth of the remark, it is manifest that he took the risk and the defendant is not liable. If as he went down he accidentally slipped or lost his balance and instinctively and naturally threw up his hand and happened in that way to touch the wire, that would not be inconsistent with due care on his part. *Garant* v. *Cashman*, 183 Mass. 13. But whether he did so or not is wholly a matter of conjecture. The fact that he exercised care in going down as it is shown that he did by the fact that he had got safely by the wire and by the fact that the spur on his right foot was driven into the limb, does not remove the manner in which the accident occurred from the field of conjecture or warrant an inference that at the instant of the accident he was in the exercise of due care. It is impossible to say that the fact that a man has been careful down to the instant before he is injured warrants of itself the inference that he was in the exercise of due care the instant after, when the accident occurs.

We assume in favor of the plaintiff that she was not bound to show positive acts of due care on the part of her intestate, but that it was sufficient if circumstances were shown which fairly

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excluded negligence on his part or from which due care could be fairly inferred. The difficulty in the present case is that no circumstances appear in regard to the manner in which the accident happened from which such an inference can be fairly drawn. In *Prince* v. *Lowell Electric Light Corp.* 201 Mass. 276, relied on by the plaintiff, there was evidence of circumstances from which an inference that the deceased was in the exercise of due care at the instant that he was killed could be fairly drawn.

The case is a hard one, but we feel compelled to say that there was no evidence warranting a finding that the deceased was in the exercise of due care when he was killed. See *MacDonald* v. *Edison Electric Illuminating Co.* 208 Mass. 199; *Horne* v. *Boston Elevated Railway*, 206 Mass. 231; *Hamma* v. *Haverhill Gas Light Co.* 203 Mass. 572; *French* v. *Sabin*, 202 Mass. 240; *Ralph* v. *Cambridge Electric Light Co.* 200 Mass. 566; *McCarty* v. *Clinton Gas Light Co.* 193 Mass. 76.

The conclusion to which we have come on the principal question in the case renders it unnecessary to consider other questions which the defendant has raised.

Exceptions sustained.

H. F. Hurlburt, Jr., (*C. M. Davenport* with him,) for the defendant.

S. J. Elder, (*J. T. Pugh* with him,) for the plaintiff.

THOMAS M. HODGENS *vs.* FRANK M. SULLIVAN.

Suffolk. March 14, 1911. — September 5, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, SHELDON, & RUGG, JJ.

Practice, Civil, Variance, Conduct of trial: requests and rulings. *Pleading, Civil*, Variance. *Contract*, Construction, Performance and breach. *Evidence*, Relevancy and materiality.

At the trial of an action for breach of a contract in writing, it appeared that the contract provided that the defendant should deliver to the plaintiff a certain number of shares "of the capital stock of a company formed or to be formed to take over" certain property, "above company to be known as the East Butte Mining Company. In case of failure of these properties being sold as at present agreed this agreement to be null and void." There was evidence that when the contract was signed a corporation had been formed by the defendant under

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the laws of Arizona named the East Butte Copper Mining Company, that negotiations were being had with a Boston firm of stockbrokers to handle the enterprise for the defendant, and that they proposed to organize a new corporation under the laws of the State of Maine to be named the East Butte Mining Company; that the Boston firm finally refused further consideration of the matter; that the Arizona corporation was known as the "East Butte Mining Company" and as "East Butte," and that the defendant had admitted in substance that the Arizona corporation was the corporation referred to in the contract. The plaintiff had demanded from the defendant shares in the Arizona corporation, and the defendant's refusal to comply with that demand was the breach of the contract assigned in the declaration. The defendant asked for a ruling, that the fact, that the evidence showed that the plaintiff had demanded shares of the East Butte Copper Mining Company instead of shares of the "East Butte Mining Company" which the contract called for, constituted a variance fatal to the maintenance of the action. The presiding judge refused to make this ruling. *Held*, that the refusal was warranted by the evidence.

In an action for the breach of a contract in writing, it appeared that the provisions of the contract were as follows: "For and in consideration of the surrender of a certain agreement . . . signed by W in regard to the payment of a commission, . . . I [the defendant] hereby agree to deliver to [the plaintiff] two thousand shares of the capital stock of a company formed or to be formed to take over said property. Said stock to be delivered as soon as issued; . . . above company to be known as East Butte Mining Company. In case of failure of these properties being sold as at present agreed this agreement to be null and void." At the trial of the action there was conflicting evidence as to the meaning of the words "as at present agreed," and the presiding judge under proper instructions left to the jury as a question of fact the determination of the question, what agreement was referred to by those words. *Held*, that the contract was ambiguous and that the action of the judge was proper.

In an action for the breach of a contract in writing, it appeared that the provisions of the contract were as follows: "For and in consideration of the surrender of a certain agreement . . . signed by W in regard to the payment of a commission, . . . I [the defendant] hereby agree to deliver to [the plaintiff] two thousand shares of the capital stock of a company formed or to be formed to take over said property. Said stock to be delivered as soon as issued; . . . above company to be known as East Butte Mining Company. In case of failure of these properties being sold as at present agreed this agreement to be null and void." The defendant asked for and the presiding judge refused a ruling to the effect that, if the contract had become "null and void" because the properties had not been conveyed "as at present agreed," then the plaintiff was in the same position with reference to his rights under the agreement with W as he was before he surrendered them. *Held*, that the refusal was proper, the ruling asked for not being germane to the issue being tried.

In an action for the breach of a contract in writing, it appeared that the provisions of the contract were as follows: "For and in consideration of the surrender of a certain agreement . . . signed by W in regard to the payment of a commission, . . . I [the defendant] hereby agree to deliver to [the plaintiff] two thousand shares of the capital stock of a company formed or to be formed to take over said property. Said stock to be delivered as soon as issued; . . . above company to be known as East Butte Mining Company. In case of failure of these properties being sold as at present agreed this agreement to be null and void." There was evidence tending to show that at the time the

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agreement was made the defendant had formed a corporation under the laws of Arizona called the East Butte Copper Mining Company, that he had entered into negotiations with a firm of stockbrokers in Boston, who had proposed to organize a corporation under the laws of the State of Maine to be called the East Butte Mining Company and to be controlled by them, which negotiations were pending when the contract sued on was made, that later those negotiations had fallen through, when the defendant entered into negotiations with a second firm of Boston stockbrokers, who undertook the defendant's enterprise through the use of the corporation he already had formed. The plaintiff demanded and the defendant refused to deliver shares in the Arizona corporation. The defendant contended that the words in the contract, "In case of failure of these properties being sold as at present agreed" referred to the negotiations with the first Boston firm, and that, they having fallen through, the contract according to its terms became "null and void," and he offered and the presiding judge refused to admit evidence tending to show that responsible persons had been ready to furnish money needed for the enterprise if the report of the first Boston firm and their mining expert were satisfactory, and had furnished a part of it, and also evidence as to a pooling of the stock of the Arizona corporation and as to expenses incurred by the defendant between the time when negotiations with the first Boston firm were discontinued and those with the second firm were completed. *Held*, that the evidence rightly was excluded as immaterial.

MORTON, J. This is an action to recover damages for a breach of the following contract:

"December 6, 1905.

"For and in consideration of the surrender of a certain agreement dated October 18, 1905, signed by Pat. Wall in regard to the payment of a commission of $20,000 on the sale of the Dutton Oneida Group I hereby agree to deliver to T. M. Hodgens two thousand shares of the capital stock of a company formed or to be formed to take over said property, said stock to be delivered as soon as issued and to be fully paid up and no further payment will be required thereon from T. M. Hodgens, the receipt whereof is hereby acknowledged of the agreement above described; above company to be known as the East Butte Mining Company. In case of failure of these properties being sold as at present agreed this agreement to be null and void.

"(Signed) Frank M. Sullivan."

There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the presiding judge * to give certain rulings that were asked for and to the exclusion of certain evidence.

* *White*, J.

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There was evidence tending to show that the plaintiff had assisted the defendant and Wall in procuring options on certain mining properties known as the Dutton Oneida group; that for services so rendered he was to receive a commission of $20,000 on the sale of the properties, and that he had a written agreement to that effect with Wall; that the defendant represented to him that he had "considerable more money" to pay before he could put through the deal and that he wanted him to take in lieu of the cash commission two thousand shares in a company to be known as the East Butte Mining Company, with the privilege of subscribing for two thousand shares more on the payment of five dollars a share; that he was certain that "the thing would go through all right and that he would make eventually perhaps the full amount of $20,000"; that the plaintiff consented and thereupon the agreement in suit was signed by the defendant; — the last part, beginning with the words "above company" being written by the defendant and the rest by the plaintiff. There was also evidence tending to show that previous to the execution of the agreement in suit a corporation had been organized under the laws of Arizona, with the name of the East Butte Copper Mining Company, by Sullivan and Wall with the assistance of one Bernard Noon, a lawyer in Butte, to which it was proposed to transfer these properties, and that after the options were secured and the corporation organized Sullivan went East to get some one to handle the matter for them and had negotiations with a firm of Boston brokers, Hayden, Stone and Company, who proposed to organize a corporation of their own under the laws of Maine, with the name of the East Butte Mining Company, to be controlled by them. These negotiations fell through and the properties eventually were conveyed through a deal made by Sullivan with another firm of Boston brokers, Paine, Webber and Company, to the East Butte Copper Mining Company, the corporation which had been organized as aforesaid by Sullivan and Wall with the assistance of Noon to take them over if the necessary financial backing could be obtained. The plaintiff asserted that he was entitled under the contract to two thousand shares of stock in the East Butte Copper Mining Company to which the properties were thus conveyed, and duly demanded the same, but the shares never were delivered to him.

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No corporation ever was formed, so far as appears, under the name of the East Butte Mining Company, for the purpose of taking over said properties. The only corporation that was organized for that purpose was the East Butte Copper Mining Company to which, as already stated, they eventually were conveyed.

There was evidence tending to show that the negotiations between Sullivan, and Hayden, Stone and Company, were pending at the time of the execution of the contract in suit, and one contention of the defendant is that the phrase, "as at present agreed," in the concluding sentence of the contract, referred to the negotiations with Hayden, Stone and Company, and that, inasmuch as those fell through, the contract became, as expressly provided, "null and void."

The other contention is that the shares to be delivered were shares in the company to be known as the East Butte Mining Company, and that the shares that were demanded and to which the plaintiff claims to have been entitled were shares in the East Butte Copper Mining Company. The defendant contended that this constituted a fatal variance and asked the presiding judge so to rule, which the judge declined to do subject to his exception. In regard to this exception it is to be observed that there was evidence tending to show that the East Butte Copper Mining Company was also known as the East Butte Mining Company and as the East Butte. Under the circumstances the alleged variance might well have been regarded by the presiding judge, as appears to have been done, as immaterial. The case stands differently from what it would have stood if there had been two companies, one named the East Butte Copper Mining Company and the other the East Butte Mining Company. There was also evidence which, if believed, warranted the jury in finding that the defendant had himself admitted in substance and effect that the East Butte Copper Mining Company was the company in which the plaintiff was entitled to shares under the contract. It would have been error, therefore, for the judge to instruct the jury, as variously requested by the defendant, that the demand for shares in the East Butte Copper Mining Company constituted a fatal variance, or that the plaintiff was not entitled under the contract to shares in that company.

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In regard to the other contention of the defendant the plaintiff contends that the phrase in question referred not to the negotiations with Hayden, Stone and Company but to the general agreement and understanding between the parties whereby options were to be procured and the properties disposed of to whomsoever might be induced to purchase them.

The contract being ambiguous, evidence of the conditions and circumstances under which it was entered into and of the facts relating to it were properly admitted for the purpose of ascertaining if possible the true meaning of the language used by the parties. *Strong* v. *Carver Cotton Gin Co.* 197 Mass. 53, 59. And it was for the jury to find as a fact under suitable instructions from the presiding judge what the agreement referred to was. This question was submitted to the jury under instructions that were not objected to and in which we discover no error. So far as the instructions requested should have been given, they were included in and covered by the charge. If the contract became "null and void" because the properties were not conveyed "as at present agreed," it was immaterial what the rights, if any, of the plaintiff were under the contract between him and Pat. Wall which had been given up when the contract in suit was signed, and the instructions relating thereto were properly refused.*

Evidence was offered by the defendant in connection with the proposed Hayden, Stone and Company deal that responsible parties were ready to furnish the money called for if the report to Hayden, Stone and Company of their mining expert was satisfactory, and had furnished a part of it, and was excluded, and we think rightly. It had no tendency to show what the agreement referred to was and was not material for any other purpose.

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* The rulings requested were as follows: "12. If the contract sued on is null and void because of the failure of the properties mentioned being sold 'as at present' agreed, then the parties are placed in the same position they were at the time the contract was signed, and the plaintiff would be entitled to all of his rights under the agreement dated October 13, 1905, signed by Patrick Wall."

"16. If the contract sued on is null and void there is no consideration for the surrender of the Wall agreement by the plaintiff and he will be in the same position with reference to his rights under that agreement as he was before he attempted to surrender them."

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We also think that the evidence that was offered as to the pooling of the stock * in ninety days and that there were additional expenses between December 12, when Hayden, Stone and Company decided to go no further with the deal, and the time when the Paine, Webber and Company deal was entered into, was rightly excluded. It had nothing to do with the main question in the case, which was, what was the agreement referred to in the phrase "as at present agreed."

The other exceptions relating to matters of evidence have not been argued and we treat them as waived.

Exceptions overruled.

C. E. Hellier, (*W. P. Everts* with him,) for the defendant.

O. Storer, for the plaintiff.

IDA B. CONVERSE & others *vs.* UNITED SHOE MACHINERY COMPANY & others.

Suffolk. March 15, 1911. — September 5, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & RUGG, JJ.

Equity Jurisdiction, To restrain unlawful acts of officers of a corporation. *Corporation*, Officers and agents, Rights of stockholders. *Equity Pleading and Practice*, Parties.

A bill in equity by individual stockholders in a corporation against the corporation, other stockholders and its officers and directors, seeking relief from an alleged wilful breach of duty on the part of the defendants resulting in a sacrifice of the corporation's interests, cannot be maintained unless it appears from the averments of the bill that it is brought, not only on behalf of the plaintiffs as individuals, but either on behalf of the corporation or on behalf of all other stockholders of the corporation who are not plaintiffs or defendants and who may join therein.

MORTON, J. This is a bill in equity to compel the Shoe Machinery Company and the individual defendants to account for alleged wrongdoing as stockholders in and officers and directors of the Goddu Sons Metal Fastening Company, in the manage-

* The question here referred to was addressed to one Paine of the firm of Paine, Webber and Company and was as follows: "Did you, representing the East Butte Copper Mining Company ever accept any subscriptions of stock in which there was the provision that the stock should be pooled for the term of ninety days?"

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ment and conduct of the business and property of said company. The Goddu Company is made a party defendant. The defendants severally demurred, and the case was thereupon reserved * for the full court; if the demurrers are sustained the bill is to be dismissed; if overruled the case is to be remanded to the Superior Court and the defendants are to answer and such other proceedings are to be had as equity may require.

Without reciting the allegations of the bill it is plain, we think, that the bill sets out a wilful breach of duty on the part of the individual defendants as directors and officers of the Goddu Company, and an intentional violation and disregard by them of the obligations resting upon them as such officers and directors, and a sacrifice by them in combination with the United Shoe Machinery Company of the interests of the Goddu Company to promote those of the Shoe Machinery Company. The bill alleges that the plaintiffs have protested to the defendants against their acts and conduct as stockholders, officers and directors of the Goddu Company without avail; that the defendants own a large majority of the stock, and that any further application to them would be futile.

At or about the time that the bill in this suit was filed, an action at law was brought against these defendants based on substantially the same allegations. The defendants demurred and the demurrer was sustained by the full court. The case is reported in 185 Mass. 422.

The bill in the present case is not brought and does not purport to be brought, as we construe it, in behalf of the plaintiffs and such other stockholders as may join, or on behalf of the corporation, but is brought by the plaintiffs to enforce individual rights assumed to belong to them as stockholders, and this constitutes, it seems to us, as the case stands, a fatal defect and renders it necessary to sustain the demurrers. The wrong, if any, was done not to the plaintiffs as individual stockholders but to the corporation, and the remedy must be sought by or on behalf of the corporation. As was said by the present Chief Justice in the former case, "All the wrongs done or intended . . . are wrongs against the corporation . . . and except through the corporation, they have no relation to the plaintiff." *Converse*

* By *Fessenden, J.*

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v. *United Shoe Machinery Co.* 185 Mass. 422, 423, and cases cited. In order to prevent a failure of justice stockholders are allowed to institute proceedings on behalf of the corporation if neither the corporation nor its officers can be induced to take action. But such proceedings derive their validity not from wrongs done to the individual stockholders instituting them but from the right of the stockholders to act under the circumstances on behalf of the corporation. When proceedings are instituted by stockholders in behalf of the corporation, it is necessary that the corporation should be made a party defendant, but we do not think that the fact that the corporation is made a party defendant is enough to show of itself that the proceedings in the present case are prosecuted in behalf of the corporation or of such stockholders as may join in the absence of any allegations in the bill to that effect. The whole tenor of the bill in the present case shows, we think, that it is brought for the purpose of enabling the plaintiffs to recover individually for damages alleged to have been suffered by them as stockholders in consequence of the wrongful conduct of the defendants as stockholders and officers of the Goddu Company in the management of its business. That, as we have said, cannot be done.

It sufficiently appears, we think, from the allegations of the bill that an attempt was made to procure redress through the corporation and its officers, and that any further attempt to obtain such redress would have been useless. We do not indeed understand the defendants to contend to the contrary. But for the reason that the bill does not appear to be brought on behalf of the corporation, or of such other stockholders, not defendants, as may join, which is in effect the same thing, and seeks to enforce individual rights against the defendants, the demurrers must be sustained and the bill dismissed.*

So ordered.

H. W. Ogden, for the plaintiffs.

C. A. Hight, for the defendants.

* Although the bill contained a detailed statement of the number of shares of the capital stock of the Goddu Sons Metal Fastening Company owned by the plaintiffs, it was not averred what proportion of the total shares of the corporation outstanding the plaintiffs' shares comprised, nor was there any averment as to other shares than those owned by the plaintiffs and by the defendants.

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BIGELOW CARPET COMPANY *vs.* BURTON H. WIGGIN & others.

Middlesex. March 24, 1911. — September 5, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Way, Private. *Prescription*. *Practice, Civil*, Conduct of trial: order of opening and closing arguments. *Land Court*. *Evidence*, Presumptions and burden of proof, Declarations of deceased persons.

At a hearing in the Land Court before the repeal of St. 1905, c. 288, of a petition for the registration of the title to a strip of land adjoining other land of the petitioner, the respondent contended that he had acquired by prescription a right of way over the strip appurtenant to adjoining land owned by him, and the judge of the Land Court found and reported to the Superior Court in accordance with the respondent's contention. At the trial in the Superior Court on appeal from the Land Court of the issue, whether the respondent had acquired such a way by adverse user, the respondent relied on the report of the judge of the Land Court, and there also was evidence that in 1841 by an agreement under seal, which had been recorded, owners of the strip in question had attempted to dedicate it to the use of the public as a public street, that because it was not accepted by the municipal authorities before the enactment of St. 1846, c. 203, which did away with the establishment of public ways by dedication, it never became a public way by dedication, that from 1841 the strip continuously remained open, that since 1859 it had been paved and kept in repair by the petitioner and his predecessor in title, who had maintained there a sign with the words "Private Way" upon it, and that the respondent continuously and openly had used the strip as a way to and from his land. The judge of the Superior Court submitted the issue to the jury. *Held*, that the action of the presiding judge was right.

If, after an attempt by the owner of a strip of land, by a deed under seal duly recorded, to dedicate it to the use of the public as a public way, which failed because there was no acceptance of the way by the municipal authorities before the enactment of St. 1846, c. 203, doing away with the establishment of ways by dedication, there was for over twenty-five years an open and uninterrupted use of the land by another landowner in connection with land of his near by, such landowner may acquire by adverse user a right to the use of the way, although after the failure of the consummation of the dedication the owner may have had an intention, which remained undisclosed, to withdraw the land from use other than in connection with his own land.

A right of way may exist over the same land in favor of different persons who acquired their respective rights in different manners, some by grant and some by prescription through adverse use.

Before 1846 the owner of certain land attempted to dedicate it to use as a public way but the dedication did not become effectual because the municipal authorities did not accept the way before the enactment of St. 1846, c. 203, which did away with the establishment of public ways by dedication. After 1859 the owner erected beside the way a sign reading, "Private Way," and a

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successor petitioned in the Land Court for the registration of an unincumbered title to the land. The Land Court decided adversely to the petitioner and he appealed. The judge framed for the trial in the Superior Court the issue, whether the respondent had obtained a right of way over the land by adverse user. *Held*, that the question, whether the maintenance of the sign was indicative of a purpose to withdraw the attempted dedication or to prevent the acquirement of a right to use the way, was for the jury.

Where an attempted dedication of certain land to use as a public way in 1841 failed because it was not accepted by the municipal authorities before the enactment of St. 1846, c. 203, which did away with the establishment of public ways by dedication, and after the enactment of that statute the owner of the land has assented to the use of the land as a way by certain persons for more than twenty years, a jury may find that such persons have gained a right of way over the land by adverse user, since the assent of the landowner may be found to have indicated, not the granting of a permission, but acquiescence in the exercise of a right inconsistent with unincumbered ownership on his part.

From the fact of open, continuous and persistent user of a way over certain land, knowledge of such user, or acquiescence therein on the part of the owner of the land, can be inferred.

At the trial in the Superior Court of an issue framed on an appeal from the Land Court by the owner of certain land who sought to have his title registered, the issue being, whether the respondent had acquired a right of way over the locus by adverse user, it appeared that the petitioner was the proprietor of a mill bordering on the locus, and evidence was offered by the respondent, for the purpose of showing that the petitioner had knowledge of the use of the way by him, which tended to show that a former superintendent of the petitioner's mill, who at the time of the trial was dead, had said that the passageway must be kept unobstructed for the use of the respondent. The evidence was admitted. *Held*, that the evidence was admitted rightly.

At the trial in the Superior Court of an issue framed on an appeal from the Land Court by the owner of certain land who sought to have his title registered, the issue being, whether the respondent had acquired a right of way over the locus by adverse user, it appeared that the petitioner was the proprietor of a mill bordering on the locus, that the respondent owned land bordering on a way, an extension of which passed over the locus, and that continuously for over twenty years he had used the locus as a way, that the petitioner's predecessor in title before 1846 had attempted to dedicate the locus to use as a public way, but that the dedication had been ineffectual because it had not been accepted by the municipal authorities before the enactment of St. 1846, c. 203, which did away with the establishment of public ways by dedication, that thereafter the way was used practically only by those having business dealings with the petitioner and his predecessor in title and by the respondent and those having dealings with him. The petitioner at the trial contended that, as the dedication had failed, the way should be considered as appropriated and used for the exclusive occupation of himself and of those having business dealings with him, and the evidence offered was confined to that inquiry, the respondent contending only that he had a right to use the way in connection with his estate. The issue was determined in favor of the respondent, and the petitioner alleged exceptions. At no time did the petitioner admit that a public way had been established by prescription. *Held*, that the petitioner could not be heard to contend in support of his exceptions that the respondent could not prescribe for a right of way over the locus in connection with his estate because the land was used as a way by the

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public, such contention being inconsistent with his previous contention and with his petition, which sought the registration of an unincumbered title to the land.

At the trial in the Superior Court of an issue framed on an appeal from the Land Court by the owner of certain land who sought to have his title registered, the issue being, whether the respondent had acquired a right of way over the locus by adverse user, the petitioner has a right to open and close before the jury, irrespective of who has the burden of proof as to the issue.

PETITION, filed in the Land Court on March 11, 1908, for the registration of the title to a strip of land in Lowell twenty feet wide and about sixty-six and one half feet long, running southerly from Market Street through to a passageway called Carpet Lane. Carpet Lane is a passageway fifteen feet wide running from the southerly end of the strip of land in controversy parallel with Market Street about two hundred and seventy feet and then turning at right angles and running northerly into Market Street. The westerly portion of the rectangle bounded by Market Street, the strip in question and Carpet Lane was owned and occupied by the petitioner with its carpet factory, and the easterly portion consisted of separate lots owned and occupied by the various respondents. Travel to and from the rear portion of the different respondents' lots and Market Street had been for many years carried on over Carpet Lane and the strip in controversy. The strip also had been used by the petitioner and its predecessor in title as the main entrance to its mill property. The respondents claimed rights of way over the strip as appurtenant to their respective estates, while the petitioner claimed that there were no rights existing therein adverse to itself and desired to close it up and build over it.

In the Land Court *Davis*, J., found for the respondents, and, the petitioner appealing, filed in the Superior Court a report of the facts found by him in accordance with St. 1905, c. 288, and framed the following issue for the jury: "Had the respondents Burton H. Wiggin, George F. Parsons and Peter Davey, or either of them, acquired an easement of a right of way appurtenant to their several estates lying between Market Street and Carpet Lane in Lowell over the land sought to be registered by the petitioner, by adverse user prior to the filing of the petition in this cause?"

In the Superior Court the issue was tried before *Hardy*, J. The bill of exceptions states: "The petitioner opened the case to

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the jury and read in evidence the report of the judge of the Land Court hereinabove set forth. The petitioner thereupon proceeded to call its witnesses, but the court upon its own motion ruled that the respondents should go forward, to which ruling the petitioner duly excepted. Thereupon the respondents rested upon the judge's report, after which the petitioner introduced the evidence of various witnesses and the respondents introduced testimony by various witnesses. At the close of the evidence the petitioner claimed the right to the closing argument, but the court ruled that the respondents were entitled to the closing argument, to which ruling the petitioner duly excepted. Thereupon, at the direction of the court, the petitioner made the opening argument, and the closing arguments were made by counsel for the respondents."

At the close of the evidence, the petitioner asked for rulings as to each respondent, that on all the evidence he was not entitled to a right of way over the disputed premises as appurtenant to his land, and for the following rulings:

"4. There is no evidence showing an adverse use by the several respondents of the parcel in dispute.

"5. If the jury find that the use by the several respondents of the parcel in dispute was permissive in its origin, there is no evidence that it ever became adverse to the petitioner or its predecessor in title.

"6. In the absence of evidence to show the contrary, it is to be presumed that if the use of the parcel in dispute began under a license it has continued to be permissive and not adverse.

"7. An adverse right to an easement cannot grow out of mere permissive enjoyment.

"8. If the use of the parcel in dispute began under the permission of the predecessor in title of the petitioner that the public in general might use the parcel as a way, and the respondents and their predecessors in title used the way under this permission merely as members of the public, and without claiming the right to use it as appurtenant to their several lots of land or without notice of any such claim to the petitioner or its predecessor in title, such use would not be adverse and would not give rise to a right of way by prescription appurtenant to the land now owned by the several respondents.

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"9. There is no evidence that the respondents or their predecessors in title used the parcel in dispute as a way except under a general permission given by the predecessor in title of the petitioner that the public might use the parcel as a way.

"10. Even though the public may have gained a right of way over the parcel by prescription, this would not give the respondents a right of way appurtenant to their several lots of land.

"11. There is no evidence that the respondents or their predecessors in title used the parcel in question under a claim of right as appurtenant to their several parcels of land.

"12. There is no evidence that the petitioner or its predecessor in title had any notice that the respondents or their predecessors in title were using the parcel as a way under a claim of right distinct from that of the general public.

"13. The indenture of December 4, 1841, by and between the Proprietors of Locks and Canals and the Lowell Manufacturing Company, so far as it had any effect, applied to the general public and constituted a license to the general public to use the parcel in question as a way.

"14. No length of user of the parcel in question as a way, by the general public or by the respondents and their predecessors in title, after the indenture of December 4, 1841, would create an easement in favor of the respondents or their predecessors in title, unless such user was adverse and not consistent with the permission granted by said indenture and the petitioner or its predecessor in title and notice of such adverse or inconsistent use.

"15. If the parcel in question was thrown open for common use as a way, the respondents could not thereafter gain a prescriptive right to use it as appurtenant to their several lots.

"16. As the title by prescription is founded on the presumption of a grant, the possession (or use) must be such as to render such a presumption reasonable.

"17. The agreement of December, 1841, between the Proprietors of the Locks and Canals and the Lowell Manufacturing Company, the then owners of the strip of land in question, that the same should be opened for a public street, is inconsistent with

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the presumption of a particular grant of a right of way appurtenant to their lands in any of the respondents; and if the jury find that after said agreement was entered into and recorded the respondents used the strip of land in question, in common with the general public, as a street, such user, however long continued, would be insufficient to establish a right of way appurtenant to their respective parcels of land in any of the respondents, as, 'No one can prescribe for a privilege which is common to everyone.'"

The presiding judge declined to rule as requested, except so far as he did so in his charge, material portions of which are described in the opinion.

The material facts in evidence and the other exceptions of the petitioner are stated in the opinion.

The jury answered the issue in the affirmative, and the petitioner alleged exceptions.

The case was argued at the bar in March, 1911, before *Knowlton*, C. J., *Morton*, *Hammond*, *Braley*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices except *Loring*, J.

H. LeB. Sampson, (*H. Wheeler* with him,) for the petitioner.

F. E. Dunbar, (*J. J. Pickman & G. H. Spalding* with him,) for the respondents.

BRALEY, J. The respondents concede that the fee in the land is owned by the petitioner, but contend that it is subject to an easement of way, which has become appurtenant to their several estates by prescription. To support their contention under the issue framed to try the question, they were required to show by a fair preponderance of the evidence that, with the acquiescence of the petitioner or its predecessor in title, the use of the land as a passageway to and from Market Street to Carpet Lane on which the rear of their estates abutted, had been open, uninterrupted and adverse for a period at least of twenty years. *Lipsky* v. *Heller*, 199 Mass. 310, 317. *Barnes* v. *Haynes*, 13 Gray, 188. *Blake* v. *Everett*, 1 Allen, 248. *Claflin* v. *Boston & Albany Railroad*, 157 Mass. 489. R. L. c. 130, § 2. But while unquestioned at the trial, that for more than the required period the way had been used openly and continuously, the petitioner asserted that in its origin the use was permissive, and that the evidence

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of the respondents was insufficient to warrant a finding that the easement had been established.

It is undoubtedly true, that an adverse right cannot be gained from permissive enjoyment, or mere accommodation, but generally in an action to establish a right of way by prescription, the question whether the use was under a claim of right, or only permissive is for the jury. *Putnam* v. *Bowker*, 11 Cush. 542.

The judge of the Land Court, whose findings of fact are made *prima facie* evidence, by St. 1905, c. 288, determined as an inference of fact, that "a free and unobstructed use of the strip in question as a way for teams and persons on foot has been acquired by prescription in favor of the respective respondents' estates." See St. 1910, c. 560, §§ 2, 8. If the jury on all the evidence found his report had been controlled, the probative effect conferred by the statute disappeared, but if unaffected the report was sufficient to support the respondents' claim. *Cohasset* v. *Moore*, 204 Mass. 173.

Independently, however, of the report, there was evidence for the consideration of the jury that prescriptive rights had been acquired. By an agreement duly executed and recorded in 1841 the owners, under one of whom the petitioner derives title, dedicated the strip of land in question as a public street. Before the enactment of St. 1846, c. 203, it never became a public way, not having been accepted on the part of the city, and since the statute, it has not been legally laid out and established. *Hayden* v. *Stone*, 112 Mass. 346. Gen. Sts. c. 43, § 82. Pub. Sts. c. 49, § 94. R. L. c. 48, § 98. But from the time of dedication it had remained open, even if since 1859 it has been paved and kept in repair by the petitioner and its grantor and a sign with the words "Private Way" had been erected and maintained. If the original intention had been to restrict its use to their estates, and to their successors in title, if the city did not accept, the undisclosed purpose of the dedicators could not operate to prevent other persons from acquiring adverse rights. *Fitchburg Railroad* v. *Page*, 131 Mass. 391, 396. *Ballard* v. *Demmon*, 156 Mass. 449, 453. A right of way may exist over the same place in favor of different persons holding by diverse titles. If some of them enjoy it by grant or custom, this does not prevent others from acquiring a prescriptive right, even if the use may

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be the same in character. *Kent* v. *Waite*, 10 Pick. 138, 142. *Ballard* v. *Demmon*, 156 Mass. 449. And the effect to be given to the act of putting up the sign, as indicative of a purpose to withdraw the dedication or to prevent the acquirement of such rights, was for the jury. During the entire prescriptive period, however, they could have been effectually barred by the statutory notice of an intention to prevent the acquisition of the easement. Rev. Sts. c. 60, § 28. Gen. Sts. c. 90, § 34. St. 1867, c. 302. Pub. Sts. c. 122, § 3, now R. L. c. 180, § 3.

But if the attempted dedication failed, the use of the way thereafter by the owners of the dominant estates could have been found by the jury to have been with the assent of the petitioner and its predecessor. The assent, if proved, was not permissive, in the sense of being an accommodation or license, but the continued use would be evidence of the exercise of an adverse right. *Bassett* v. *Harwich*, 180 Mass. 585, 586. *Bolivar Manuf. Co.* v. *Neponset Manuf. Co.* 16 Pick. 241, 246, 247. *Stearns* v. *Janes*, 12 Allen, 582, 584, and cases cited. As said by Holmes, C. J., in *Bassett* v. *Harwich*, 180 Mass. 585, 586, "so if the evidence tended to prove an attempted dedication, although the dedication failed because of Pub. Sts. c. 49, § 94, it would tend to show that the use thereafter was under a repudiation by the owner of any right to stop it. It would help, not hinder, the proof of an adverse use."

It also was unnecessary for the owners of these estates formally to assert or to give notice that they claimed the right to pass and repass, or that the petitioner or its predecessor should have been directly informed of their claim. *Gray* v. *Cambridge*, 189 Mass. 405, 418. The use was open, continuous and so persistent that the jury could find from these circumstances alone that they knew of it, or their acquiescence could be presumed even if actual knowledge may not be shown. *Deerfield* v. *Connecticut River Railroad*, 144 Mass. 325, 338. *McCreary* v. *Boston & Maine Railroad*, 153 Mass. 300, 305.

But there was direct evidence of actual knowledge. The statement of one Lyon, who died before the trial, that the passageway must be kept unobstructed for the use of the abutters on Carpet Lane was admissible. It was made by a person entrusted with superintendence of its mill property and while in

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the management of the petitioner's business, and, from the evidence of the witness who testified to the declaration, it appears to have been within the scope of his employment. *Parker* v. *Boston & Hingham Steamboat Co.* 109 Mass. 449, 451, 452. *Bachant* v. *Boston & Maine Railroad*, 187 Mass. 392, 396. *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 199 Mass. 22, 42. R. L. c. 175, § 66.

The refusal to give the first four requests, and the ninth, eleventh and twelfth requests was right, and the fifth, sixth, seventh, tenth, thirteenth, fourteenth, fifteenth and sixteenth requests, so far as applicable, were fully covered by the instructions.

It is argued that the eighth and seventeenth requests should have been iven, and that the instructions to which the petitioner excepted are inconsistent with the requests. The basis of the objection is, that if the way was used as a street in common with the general public, no prescriptive right ever attached. The main entrance to the mill property with the company's office fronted on the southerly end of the way, where it turned into the lane, and according to all the evidence the use was substantially confined to its employees and tenants and persons having occasion to transact business at the office, and to the owners of the several estates of the respondents and those who dealt with them. The petitioner neither at the trial nor at the argument contended or admitted that a public way had been established by prescription, and the respondents therefore could not prescribe for a privilege common to the whole community. *Thomas* v. *Marshfield*, 13 Pick. 240, 249. But it contended that as the dedication failed, the way should be considered as appropriated and used for the exclusive use and accommodation of the corporation and of its employees and tenants. The evidence it offered was confined to this inquiry, while the respondents relied wholly upon the use of the way as connected with their estates. It cannot, in order to defeat them, resort to a defense it did not care to make and which if successful would destroy its alleged right to the registration of an unincumbered estate. If the entire charge is read in connection with the evidence, and with the respective positions of the parties in mind, the instructions clearly stated, that if the use was permissive, it could not

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ripen into an easement, and the burden was on the respondents to prove that it was adverse. Whatever the mode of travel may have been, the jury must have understood, that unless they were convinced that the use of the way by the owners was in connection with the respondent estates and not merely as travellers or members of the general public an easement had not been acquired.

The remaining exceptions to the instructions are covered by what has been said and need not be further considered.

But if there was no error in the admission of evidence or in the rulings and instructions, the ruling that as the respondents had the burden of proof they had the right to the opening and close, requires us to sustain the exceptions. The petitioner asks to have registered a title in fee, and it is the moving party. If an issue for a jury is framed, that is only an incident of the proceedings, and the transfer of the issue to the Superior Court for trial does not remove the case, which still remains in the Land Court for final disposition, after the answer of the jury has been certified. *Weeks* v. *Brooks*, 205 Mass. 458. It long has been settled in actions at law, and under issues framed for a jury in equity and in probate appeals where a will is offered for proof, that the plaintiff, or the executor, has the right to open and close before the jury, irrespective of the form of the pleadings, or whether, from the nature of the defense or of an affirmative claim or issue, the burden has shifted to the adversary party. *Dorr* v. *Tremont National Bank*, 128 Mass. 349, 358–360. The practice should be uniform, and there is no reason why the case at bar should be taken out of this general and salutary rule.

Exceptions sustained.

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ROSE A. MARSTON *vs.* BENJAMIN PHIPPS & another.

Suffolk. June 19, 1911. — September 5, 1911.

Present: MORTON, HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, In use of highway. *Nuisance*. *Ice and Snow*. *Way*, Public. *Practice, Civil*, Parties, Misjoinder of counts.

At the trial of an action against the owner of a house abutting upon the highway for injuries alleged to have been caused by the plaintiff slipping upon a ridge of ice caused by drippings from eaves of the defendant's building which overhung the way, the plaintiff testified in direct examination that upon a slippery, misty morning she was approaching a store in the defendant's building by walking in a dry place close to the building as the rest of the sidewalk was covered with ice, that as she walked she looked down for five or six feet ahead of her and that there was nothing to prevent her seeing any ice that was there, that when she got opposite the door of the store she stepped upon the ridge of ice in question and fell, that the ridge of ice was not more than four or five inches wide and stood up two or three inches across the dry bricks. In cross-examination she testified that she could not account for her not seeing the ridge of ice. *Held*, that the question of the plaintiff's due care was for the jury.

Where, at the trial of an action against the owner of a building to recover for injuries alleged to have been caused by the plaintiff slipping upon a ridge of ice alleged to have been formed by water dripping from the roof of a bay window of the building which overhung the sidewalk, there is evidence from which the jury might find that the roof projected so that snow would and did accumulate upon its top and there melt and drip upon the sidewalk and freeze, and that the ridge of ice upon which the plaintiff fell was formed thus, the case is for the jury although different parts of the building may have been occupied by various tenants at will, especially if there is evidence that the defendant procured and paid for all the repairs that were made upon the building and assumed the care of keeping the sidewalk clear of snow and ice, employing one of the tenants to do it for him.

Since a landlord is responsible for injuries resulting to third persons from the maintenance upon his property in the possession of a tenant of a nuisance caused by a condition of the premises which was in existence at the time when they were let, the owner of a building, so constructed that a bay window overhangs a public sidewalk and drippings from it cause a ridge of ice upon the sidewalk, is liable to one who, while in the exercise of due care, was injured from a fall upon the ice, although the premises were in the possession of a tenant.

If a declaration in an action of tort against two defendants contains three counts, each of which alleges that the plaintiff was injured by falling upon ice negligently allowed to accumulate in front of certain premises, the first count being against both defendants and the second count against one defendant and the third against the other, and if one of the defendants has died after the injury to the plaintiff and before the bringing of the action but the officer who served the writ makes a return of service at that defendant's "last and usual place of abode" and the other defendant files an answer and a suggestion of the

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death of his co-defendant but does not demur to the declaration, the case properly may proceed to trial against the only defendant served upon and answering and upon the count which sets out a cause of action against him alone.

TORT for personal injuries alleged to have been caused by the plaintiff slipping on March 22, 1906, upon a ridge of ice in front of premises numbered 341 on Main Street in that part of Boston called Charlestown. Writ dated May 19, 1906.

Benjamin Phipps and Sarah C. Phipps were named as defendants in the writ. Benjamin died on May 1, 1906, testate. There was an officer's return of service upon Benjamin "at his last and usual place of abode." There was no appearance or answer on behalf of Benjamin's heirs or legal representatives. Sarah appeared and filed an answer and a suggestion of the death of Benjamin. She filed no demurrer to the declaration, which was in three counts, the first against Benjamin and Sarah, the second against Benjamin only, and the third against Sarah only.

In the Superior Court the case was tried before *Dana*, J. It was undisputed that the premises numbered 341 Main Street were owned at the date of the accident and for some time before by Benjamin Phipps and Sarah C. Phipps as tenants in common; that the store on the ground floor was occupied by a man named Pitman, a tenant at will, and the upper rooms by a man named Farley, a tenant at will.

On the question of her due care, the plaintiff testified that she lived in a near by house on the same side of Main Street as the defendant's building; that on the morning of the accident she left her house to go to Pitman's grocery; that she had a milk pitcher in her hand; "that she was walking along very carefully as the sidewalk was covered with ice, and she saw a dry space up by the building, and she thought she would walk up there to prevent herself falling, so, when she got opposite the door, she stepped on this piece of ice and fell down; that the dry space was wide enough to walk along carefully; that the piece of ice she fell on was right in front of the store door; that she had not seen the ice before she fell on it; that it was slightly misting that morning." On cross-examination, she testified that between that dry space and the edge of the sidewalk was all ice, "just iced over, as if it had rained and frozen on"; that, as she was walking, she looked down for five or six feet ahead of her and

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there was nothing to prevent her seeing any ice that was there. Q. "How do you account for it that you didn't happen to see it, if it was a ridge two inches wide or two inches thick, that stood right up there in your pathway, — how do you account for it that you didn't happen to see it?" A. "Well, because I didn't, I cannot say, only that I didn't see it. I was walking along and didn't see it until I fell on it." She further testified that the ridge of ice extended "right out from about the middle of the doorway of the store towards the centre of the sidewalk, — it was not more than four or five inches wide and stood up two or three inches across the dry bricks."

Other facts are stated in the opinion.

At the close of the evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

F. T. Leahy, for the plaintiff.

J. K. Berry, *E. C. Upton & G. S. Harvey*, for the defendants.

SHELDON, J. This case was tried against the female defendant alone, the other defendant named in the writ being dead. There was evidence for the jury on the question of the plaintiff's due care. Knowlton, C. J., in *Cavanagh* v. *Block*, 192 Mass. 63, 64, and cases cited. The jury could have found also that her injury was due to her having slipped on a ridge of ice upon the sidewalk. They could have found that the bay window on the defendant's building projected beyond the street line and over the sidewalk, so that snow would and did accumulate upon its top and there melt and drip from the sloping planes which formed its top and roof, and so fall upon the sidewalk. They could have found further, although as to this the evidence was meagre, that the ridge of ice upon which the plaintiff fell had been formed in this way, by the freezing of water which had dripped from the projecting bay window.

Upon such findings the plaintiff was *prima facie* entitled to recover. The case would come under the principle that one who so constructs or maintains a structure upon his own premises as to cause an artificial discharge or accumulation of water upon a public way, which by its freezing makes the use of the way dangerous, will be held liable to one who, being rightfully upon the way and in the exercise of due care, is injured in consequence

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of such dangerous condition. *Drake* v. *Taylor*, 203 Mass. 528. *Field* v. *Gowdy*, 199 Mass. 568. *Hynes* v. *Brewer*, 194 Mass. 435.

The fact that the defendant had let different parts of her building to different tenants at will is not decisive in her favor. So far as appears, she retained control of the outside and roof of the bay window. She did not make merely occasional repairs upon the building as a matter of favor; it could be found that she procured and paid for all the repairs that were made. *Perkins* v. *Rice*, 187 Mass. 28, 30. *Readman* v. *Conway*, 126 Mass. 374. It could be found from her own testimony that she assumed the care of keeping the sidewalk clear of snow and ice, and employed Pitman to see to this for her. Moreover, if she let the building with the bay window overhanging the sidewalk of a public way (see *Opinion of the Justices*, 208 Mass. 603, 625) and constructed as it could be found that this was, the case would be within the rule of *Maloney* v. *Hayes*, 206 Mass. 1, and she would herself be responsible for the nuisance caused by her tenant's using the leased premises in the manner in which they were adapted and designed to be used.

The plaintiff's right of action is not affected by the provisions of St. 1908, c. 305, passed since her action was brought.

Perhaps the defendant might have demurred to the declaration for a misjoinder of counts. But that was not done; and the case rightly proceeded against the only defendant who was alive and was served on. *Brown* v. *Kellogg*, 182 Mass. 297. *Elliott* v. *Hayden*, 104 Mass. 180.

The case should have been submitted to the jury upon the third count, which alone was relied on.

Exceptions sustained.

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NEW ENGLAND FOUNDATION COMPANY *vs.* WILLIAM W. REED & others.

Norfolk. January 17, 18, 1911. — September 6, 1911.

Present: KNOWLTON, C. J., MORTON, BRALEY, & RUGG, JJ.

Equity Jurisdiction, To relieve from results of fraud. *Deceit. Conspiracy. Equity Pleading and Practice*, Master.

A bill in equity against a builder and certain trustees alleged in substance that the defendants had conspired and jointly by false representations and fraud had induced the plaintiff to enter into a contract to furnish work and materials for the construction of a building on land represented to belong to the builder and to carry out such contract, that the land did not then belong to the builder but later was acquired by him subject to a construction mortgage to the defendant trustees of such a nature as, under circumstances stated in the bill, to make it practically impossible for the plaintiff to enforce his contract. The prayer of the bill was that the mortgage be declared void, that the land be sold and that the plaintiff be satisfied from the proceeds. A master to whom the suit was referred found in substance that the builder had negotiated with the owner for the purchase of the land with a view to building a block of houses thereon, and, before the terms of purchase were concluded, had induced the plaintiff by false representations to begin work on the lot, a written contract as to the work having been made between the plaintiff and the defendant builder. The plaintiff had no direct dealings with the defendant trustees and made no inquiries of them and received no information from them directly or indirectly. More than fifteen days after the making of the contract with the plaintiff the builder through deceit practised upon the owner, in which the managing trustee participated, procured a conveyance of the land to him and at the same time executed to the trustees a construction mortgage of such a nature as to make it "not only possible but probable at the outset" that the builder would be unable to proceed and that the plaintiff would be unable to enforce performance of his contract. The managing trustee maintained the relation of mortgagee to the enterprise and had no other active interest regarding it. All joint action between the builder and the other defendants ended with the execution of the mortgage. The managing trustee did not intend the builder to fail and did not have the equivalent of actual knowledge of his operations. The builder did fail and the plaintiff suffered a loss. *Held*, that on such facts the trustees were not liable for the misrepresentations of the builder and that the suit could not be maintained for the purposes for which it was brought.

Where in a suit in equity it is sought to fix upon several defendants liability for damages resulting from deceit and fraud actively practised upon the plaintiff by one only of the defendants on the ground that all of the defendants conspired in the deceit and fraud, passive observation of the conduct or readiness to profit by a failure in duty of the actively fraudulent defendant is not enough to make his co-defendants liable in the absence of some relation on their part of agent, copartner or confederate toward him.

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It is the sole duty of a master, to whom a suit in equity has been referred under the ordinary rule, to find and report the facts, and he is not required to make general rulings of law as to the effect of such findings.

Where a master, to whom a suit in equity was referred, in his report finds facts from which it appears that the suit cannot be maintained, the suit will be dismissed although the report also contains rulings by the master to the effect that upon the facts reported the suit should be maintained.

BILL IN EQUITY, filed in the Superior Court on April 26, 1909, averring in substance that the defendants, William W. Reed, George H. Reed, and Harrison W. Conner, individually, and William W. Reed, George G. Stone, George L. Gilmore, as trustees of the Lexington Club, acted in concert in inducing the plaintiff by deceit and fraud to enter into a contract with the defendant Conner to furnish certain materials and labor for the construction of apartment houses upon land abutting on Longwood Avenue in Brookline, the defendant trustees taking a construction mortgage upon the premises of such a nature as to prevent the plaintiff from being paid. The prayers of the bill in substance were that the mortgage be cancelled, the land be sold and the plaintiff be paid its claim for the proceeds.

An interlocutory decree was made that the case be "referred to Wade Keyes, Esquire, as master." The decree contained no specific directions to the master. The substance of material facts found by him is stated in the opinion. Among other findings and rulings were the following:

"The crucial legal proposition in this case appears to the master to be simply whether the deceit practised on Stearns by Conner and W. W. Reed makes W. W. Reed and the Lexington Club legally responsible for the consequent loss to other persons who fall naturally and innocently into the mesh and suffer as did this plaintiff. . . .

"On the part of the defendants W. W. Reed and Conner, it is urged in argument that if there was any fraud in the acquisition of the land from Stearns he alone might complain, and he having complained in Court and been appeased by one of these defendants they are not now together liable to any person who dealt with Conner alone with reference to the erection of buildings on the land in question. I do not so find. On the contrary, I do find that the plaintiff has actually suffered damage by reason of its dealings with Conner on account of its unrequited labor upon

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the land, which entire damage it would not and could not have suffered when and where it did suffer if the fraudulent device for the acquisition of the land had not been put in successful execution against Stearns. The work done on the land by the plaintiff was primary work fundamentally necessary for the erection of buildings thereon, which work and consequent erection at somebody's labor and expense other than at Conner's expense was a necessary part of the building operations and known to W. W. Reed on January 4. The work of the plaintiff was actually in progress when the title to the land was acquired from Stearns. This fact was known to W. W. Reed as well as to Conner, but notwithstanding they concocted a financial arrangement at the time which was designed not only to trick Stearns, but of necessity to disregard the welfare and jeopardize the rights of this plaintiff and such other credulous persons as Conner might induce thereafter to contribute labor and materials to the enterprise on the financial credit of Conner.

"As a matter of fact W. W. Reed thought the loan safe to make from his standpoint and thought Conner, as mortgagor, so likely a man to be profitable to himself, as mortgagee, that he, Reed, was inclined and did actively assist Conner to become a landowner in order that Conner might become a mortgagor with himself, Reed, trustee of the Lexington Club, as first mortgagee. When this point was reached the joint action of the two, so far as the active interest of Reed was concerned, ended, but I am constrained to report that Reed under the circumstances could not thus embark with Conner upon such an enterprise in such a way and withdraw from beneath the burdens of it at his pleasure while retaining the privilege and capacity as mortgagee of realizing on the construction mortgage whatever future benefits might thereafter legally accrue to the holder of it.

"The financial relations between W. W. Reed and Conner were so framed up between them that when title to the land passed to Conner on January 4, it was morally certain from their standpoint that each had nothing to lose and each had a likelihood of gain. From the foregoing facts I report it to have been their expectation that if Conner succeeded in completing his buildings and obtaining his permanent mortgage loans the construction mortgagee would be fully repaid with interest and Reed would

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profit personally by way of commissions, services and other incidental methods peculiar to his craft. While on the other hand, if Conner did not succeed then the construction mortgage would be foreclosed and its holder could on foreclosure sale receive from another purchaser its due or purchase itself and gather in as an unearned increment added to the premises the value of such labor and material thereon as had been contributed by such persons as Conner had persuaded on his representations of personal credit thus to improve the land. And Conner, of course, would have as his profit, in the event of his failure, such sums of money received from Reed as he had been enabled to retain for his personal use. . . .

"The occupancy, and subsequent title to the land, in Conner, who had invested practically nothing therein, enabled him to procure and maintain a credit he was not entitled to and caused this plaintiff to expend labor and materials of considerable value over a considerable period of time and thus far without recompense. Upon all the foregoing findings I find that the work done by this plaintiff for Conner and the damages it suffered by reason of not getting any portion of its pay from Conner for its work are the natural and obvious result of the situation existent at the time the conveyance of land and transfer of title went into effect January 4, 1909, which situation was created by W. W. Reed and Conner acting in conjunction at the time. . . .

"It seems to the master to be the especial province of equity to fasten the responsibility for harm done upon those who do it. And I therefore find and rule upon all the foregoing findings in this case that the harm done this plaintiff of which it justly complains in its bill was primarily occasioned by the joint acts of the defendants, W. W. Reed and Conner. I find and rule that W. W. Reed, representing the Lexington Club as his principal, having actively aided and entrusted Conner with the means of deceiving without repudiating him or disclosing the deception is responsible in damages to such innocent person dealing with Conner as may naturally and legally suffer in consequence of the wrongful use of said means by Conner. I find the plaintiff to be such an innocent person. Therefore . . . I further find and rule that the plaintiff is entitled to recover said sum of $8,216 with interest from April 5, 1909, together with the costs

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of this suit, from the defendants, Harrison W. Conner, William W. Reed and the Trustees of the Lexington Club."

The defendant Reed and the defendant trustees filed the following among other exceptions to the master's report: (1) "in that the master rules that the plaintiff is entitled to relief in this suit, the master having no authority to make any ruling of law whatsoever"; (2) "because said ruling is not warranted by the facts stated in said report." The defendant Conner filed the following among other exceptions: (5) "the defendant Conner objects to the master's report because of the finding that the plaintiff has suffered legal damage."

The exceptions were heard by *Richardson*, J., who made a memorandum stating: "I am unable to see, upon the facts stated by the master, that the trustees of the Lexington Club or said Reed are liable in damages to the plaintiff for the amount stated by the master, either on the alleged ground of conspiracy, or on the ground of false or fraudulent representations, made or authorized to be made by them, deceit or otherwise. The facts stated do not show that there was any such conspiracy between or by Conner and the trustees of the Lexington Club, as to make statements of Conner, not made in their presence or by their authority, evidence against them."

A final decree dismissing the bill accordingly was entered. The plaintiff appealed.

J. B. Sullivan, Jr., (*P. R. Blackmur* with him,) for the plaintiff.

E. G. McInnes, (*C. P. Lincoln* with him,) for the defendants.

RUGG, J. This is a suit in equity by which the plaintiff seeks to hold the several defendants on the ground of a conspiracy to defraud it, for work performed and materials furnished in the construction of apartment houses. The gist of a civil action of this sort is not the conspiracy, but the deceit or fraud causing damage to the plaintiff, the combination being charged merely for the purpose of fixing joint liability on the defendants. *May* v. *Wood*, 172 Mass. 11, and cases cited at page 13. *Gurney* v. *Tenney*, 197 Mass. 457, 465.

The material facts are these: The defendant Conner conceived the idea of building a block of houses in Brookline, and had negotiations for the purchase of land for this purpose with one Stearns, the owner. Before the terms of this purchase were

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concluded Conner, by misrepresentation as to his financial standing, induced the plaintiff to commence work on the lot, and a written contract between the plaintiff and the defendant Conner was signed for concrete piling on December 24, 1908. It is for performance of this contract that the plaintiff seeks to hold the other defendants. The plaintiff does not allege any communication between it and the other defendants. It made no inquiries of them, and received no information from them, directly or indirectly. At the time it began work, and when the contract was signed, Conner did not own the land. On January 9, 1909, Conner procured, through deceit, as the master found, as to his financial resources, in which the defendant W. W. Reed participated, the conveyance of the land from Stearns to himself and at the same time executed to Reed and his associates a first mortgage. Conner was without money, and as a stranger he had sought Reed for the purpose of placing this mortgage, from the proceeds of which he hoped to be able to build the houses. The money on the mortgage was to be advanced in instalments, and a part of it was to be used toward the purchase price of the land in a way which, as to Stearns, the master has found was fraudulent. But he also has found that Conner was not the agent of Reed, and that although Conner was without experience, skill or efficiency in this kind of business, and the plan of getting title and application of advancements on the mortgage were such as to make it "not only possible but probable at the outset" that Conner would not be likely to be able to proceed, yet he also found that Reed maintained the relation of mortgagee, and had no other active intent about the matter; that the joint action between Reed and Conner ended with the execution of the mortgage from Conner to Reed and his associates, and that Reed did not intend to cause Conner to fail, and did not have the equivalent of actual knowledge as to the result of Conner's operations.

This does not go quite to the extent of making Reed and his associates liable for the false representations of Conner, or for a conspiracy with him to defraud. It does not show a connection sufficiently close between Reed and Conner to constitute them joint adventurers, or to establish the relationship of principal and agent. This is not a case where the master has found that

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the real design of the defendant mortgagees was to put forward the nominal owner of the land for the purpose of procuring its improvement through the labor and materials of others, either consciously intending or as reasonable men bound to anticipate the result that through the failure of the nominal owner, all that was done would enure to their benefit. He does not find that the elaborate agreement between Conner and Reed for the advancement of the money ostensibly by way of mortgage, although lacking nothing in legal form, was in truth a mere pretense to mask the real purpose of ultimately defrauding all who might add value to the property described in the mortgage. Nor does he find that Reed and his associates used Conner as their tool, either with or without his knowledge and consent, in a scheme which they had made their own to the end that they might defraud. Findings like these would call for the application of different principles of law. But in this case the plan originated with Conner. The contract, by the performance of which the plaintiff has suffered damage, was made before the defendants other than Conner had any connection with the matter. The mortgage was a genuine one. The defendant mortgagees were able and ready to carry out their part of the mortgage contract with Conner and to advance him the money from time to time as required by it. While Conner was wholly incompetent, he regarded himself as the responsible head, and was treated as such by the other defendants. When the relation between the parties is not such as to impose some duty, passive observation of the conduct or readiness to profit by the failure of one for whom no legal responsibility exists as agent, copartner, confederate or otherwise, does not constitute a basis for civil liability as a joint participator. This case is distinguishable in its facts from *Light* v. *Jacobs*, 183 Mass. 206, and *In re Friedman*, 164 Fed. Rep. 131, 134, especially relied upon by the plaintiff.

The master undertook, as a part of his report, to make rulings of law. His only duty was to find the facts, and he was not required to make general rulings of law as to the effect of these findings. *Clark* v. *Seagraves*, 186 Mass. 430, 435. *Adams* v. *Young*, 200 Mass. 588, 590. The facts which he has reported do not warrant the ruling that the defendants are responsible in damages to the plaintiff. The first and second exceptions of the

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defendant Reed and of the defendants trustees and the fifth exception of the defendant Conner to the master's report should be sustained.

It does not appear to be necessary to discuss the question whether the finding of the master was warranted, that the deed from Stearns to Conner was procured by the deceit of the latter in which Reed participated.

Decree dismissing the bill affirmed.

ATLAS SHOE COMPANY *vs.* ABRAHAM BLOOM & others.

Suffolk. January 26, 27, 1911. — September 6, 1911.

Present: KNOWLTON, C. J., MORTON, BRALEY, & RUGG, JJ.

Contract, Validity, In writing, Consideration. *Fraud. Guaranty. Evidence*, Of book accounts. *Equity Pleading and Practice*, Master's report.

The principle of law, that mere ignorance of the contents of a contract in writing which a party voluntarily executes is not sufficient ground for setting it aside when he subsequently discovers that its contents are different from what he supposed them to be, was applied in this case where the party seeking to set aside the contract was an old foreigner who was led to sign the instrument through deception practised upon him by his son, in which the other party to the contract in no way participated.

A master, to whom was referred a suit in equity by a wholesale dealer in shoes against the signer of a certain alleged guaranty, seeking equitable relief, found that, upon the defendant's son, a customer of the plaintiff, becoming in arrears in the payment of his account, the plaintiff stated to him "that his account must be protected and that unless he could get it guaranteed by a responsible person the plaintiff would have to close it," and "that to make his account good it must be changed to a consigned account and his present indebtedness guaranteed"; that the son communicated to the defendant the plaintiff's statement; that thereupon the defendant signed and delivered to the plaintiff an instrument in writing as follows: "For valuable considerations, I hereby guarantee full and complete payment to the" plaintiff "of all debts now owed or to be owed in the future by" the son "to the" plaintiff; that there was no evidence that thereafter any goods were sold to the son on open account. *Held*, that the guaranty could not be enforced because of lack of a consideration running from the plaintiff to the defendant, it not appearing that any continued credit was given to the son or that any proceedings against the son were forborne at the defendant's request.

Books of account as to mercantile transactions, the entries in which were transcribed from temporary memoranda made by clerks who had no knowledge of the sale and delivery of the goods therein mentioned except upon information received from other clerks whose duties are not shown, are not admissible in

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evidence to prove the state of the account upon the sole supporting testimony of the clerks who made the entries in them.

If the plaintiff in a suit in equity discovers, after the filing of a report, adverse to him, of a master to whom the suit was referred, that through inadvertence he neglected to offer evidence which would have supported his contentions, he should move to recommit the report to the master for the hearing of further evidence. After the report has been confirmed and a decree entered dismissing the bill, from which the plaintiff has appealed, it is too late to ask that the case be reopened.

BILL IN EQUITY, filed in the Superior Court on March 24, 1909, against Abraham Bloom, his daughter Fannie Krouse and her husband, David Ziskend and Phillip Cohen, another son in law, alleging in substance that the defendant Bloom owed the plaintiff under the provisions of the agreement hereinafter quoted $1,993.42, that the plaintiff demanded payment of him, that he asked for time and forthwith and in fraud of his creditors conveyed to his daughter, the defendant Fannie Krouse, an equity in a house and land numbered 20 on Minot Street in Boston, that the daughter mortgaged the land to his son in law, the defendant Cohen, who participated in the fraud, and he in turn assigned the mortgage to the defendant Ziskend, who shared in the scheme to defraud the plaintiff. The prayers of the bill in substance were for a cancellation of the deed from Bloom to his daughter and of the mortgage then held by Ziskend, and for the application of the equity of the defendant toward payment of the debt owed to the plaintiff.

The case was referred to Arthur H. Russell, Esquire, as master. His findings were in substance as follows:

The plaintiff since the latter part of 1906 had been selling goods to one Bernard E. Bloom, the son of the defendant Abraham Bloom, who was established in business in Worcester. On February 3, 1908, the plaintiff asserted that Bernard was indebted to it in the sum of $1,508.71 for goods sold and delivered to him on open account in the regular course of trade. Before this time its officers had demanded of Bernard that he should furnish a guarantor upon his account and should change the account from an open to a consigned account. In response to this demand, Bernard on February 3, 1908, brought the defendant, Abraham Bloom, to the office of the plaintiff, where Harry N. Thomas, who had charge of the credits of the plaintiff, in the presence of the

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defendant Bloom and others, dictated to a stenographer a paper in the following words: "February 3, 1908. For valuable considerations, I hereby guarantee full and complete payment to the Atlas Shoe Company, Boston, Mass., of all debts now owed or to be owed in the future by Bernard E. Bloom of Worcester, Mass., to the said Atlas Shoe Company"; and that the defendant Bloom was requested to sign the paper, which he did. Although this paper was dictated in the defendant Bloom's presence, he did not understand its terms by reason of his limited intelligence and unfamiliarity with the English language. At the time the amount in which Bernard was claimed to be indebted to the plaintiff was not stated to the defendant Bloom and was not shown to him. The only statement made to him at this time was a statement by his son, made to him in the Jewish language, that the paper which he was to sign was one making him responsible for the bill of goods to be delivered to his son, amounting to $200 or $300. No money of any kind was paid by any one to Abraham Bloom at the time of the signing of this paper, nor was any promise made to him of any money consideration.

No evidence was introduced as to the value of any goods delivered to Bernard on open account by the plaintiff after the date of the writing above referred to, February 3, 1908, if any were delivered.

On February 28, 1908, the defendant Abraham Bloom again was brought to the office of the plaintiff and was told by some person representing the company that it was necessary for him to sign a further paper, which was not read to him, but which he signed upon presentation. That paper was a guarantee to Rice and Hutchins, Incorporated, of the punctual performance by Bernard E. Bloom of an agreement made by him with Rice and Hutchins, Incorporated, under even date, which was an agreement with reference to goods to be consigned to said Bernard by Rice and Hutchins, Incorporated, or some other concerns or corporations controlled by said Rice and Hutchins, Incorporated. All goods delivered by the plaintiff to Bernard between March, 1908, and October, 1908, were on this so called consigned account.

In September, 1908, Bernard E. Bloom absconded. An in-

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ventory was made up by the plaintiff on the stock of goods in his possession at Worcester which it had consigned to him. Possession of these goods then was taken by the plaintiff and they were reshipped to Boston and credited, leaving an apparent balance due to the plaintiff on this consigned account of $624.69.

The plaintiff claimed the balance due from Bernard upon open account upon September 21, 1908, to have been $1,424.85, which was $83.86 less than the amount which the plaintiff claimed Bernard was indebted to it on open account on the date of the signing of the first paper by the defendant Abraham Bloom.

"No evidence was offered as to any delivery of goods to Bernard E. Bloom other than the evidence that the books of the plaintiff company showed the amounts claimed, as hereinafter reported."

"The plaintiff produced its books of account and asked a witness, under whose supervision the books were kept, 'What do these books purport to show to be due from B. E. Bloom to the Atlas Shoe Company?' The books were kept upon what is familiarly known as the 'loose leaf system' and the entries thereon were made up from temporary memoranda, and the clerks who made the same had no knowledge of the sale and delivery except from information received from other clerks. I ruled that the books were not admissible as proof of sale or delivery, but I admitted the question as bearing upon information which the plaintiff claimed to have conveyed to Abraham Bloom at the time of his signing the paper of February 8, 1908. The defendant duly excepted to the admission of this evidence. The witness stated the amount to be as hereinbefore set out in this report and evidence was subsequently introduced by the plaintiff claiming that the amount of this indebtedness was stated to the defendant Abraham Bloom at the time of the signing of the paper of February 3, 1908."

The master also found that the plaintiff had brought an action against the defendant Bloom upon the alleged guaranty in the Municipal Court of the City of Boston, that judgment had been entered in that court upon default of the defendant, from which the defendant had appealed to the Superior Court and that the appeal was pending there when this suit was brought.

Because of the decision other findings of the master are immaterial.

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The plaintiff excepted to the report for reasons which appear in the opinion. The exceptions were heard by *Richardson*, J., who overruled them. A final decree was made dismissing the bill. The plaintiff appealed.

W. M. Blatt, for the plaintiff.

P. B. Kiernan, for the defendants.

BRALEY, J. The defendant Abraham Bloom signed the guaranty dictated in his presence, and upon which the bill is brought, although the master finds that he did not understand its terms because of his limited intelligence and inability to read our language. But the plaintiff held out no inducements, and he could have refused to sign until the contents had been translated or fully explained to him, or, if deceived by the representations of his son that the undertaking only made him responsible for a small bill of goods to be delivered in the future, there is no statement that the deception was instigated or participated in by the plaintiff. In the absence of fraud practised upon him, the defendant comes within the general rule, that mere ignorance of the contents of an instrument which a party voluntarily executes is not sufficient ground for setting it aside if ultimately the paper is found to be different from what he supposed it to be. *Rice* v. *Dwight Manuf. Co.* 2 Cush. 80. *Leddy* v. *Barney*, 139 Mass. 394. *Freedley* v. *French*, 154 Mass. 339, 342.

But if he cannot avoid the effect of his signature, the guaranty in terms included not only goods to be furnished, but payment of any past indebtedness due to the plaintiff from Bernard E. Bloom, and as the guaranty formed no part of the original credit, the consideration of the original debt would be insufficient to support the promise. *Cabot* v. *Haskins*, 3 Pick. 83, 93. *Tenney* v. *Prince*, 4 Pick. 385. The plaintiff endeavored to supply this essential element, and the master reports, that, the plaintiff having informed the son before the guaranty was given "that to make his account good it must be changed to a consigned account and his present indebtedness guaranteed," and "that his account must be protected and that unless he could get it guaranteed by a responsible person the plaintiff would have to close it," and that the defendant signed after this last statement had been communicated to him. The master, while he does not specifically state that the defendant obligated himself to preserve

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the credit of his son, finds that no goods were furnished under the guaranty, and no action was brought against the son on the past account until some six months had elapsed. If the only consideration was a continuous credit in the future, it had failed, as no goods were delivered, and the failure of consideration would discharge the guarantor. *Cooper* v. *Joel*, 1 DeG., F. & J. 240. But if the words "that his account must be protected" can be treated as a promise by the plaintiff to forbear to press collection of the debt, followed by an actual forbearance for a reasonable time, even if no time was named, there would have been a sufficient consideration to support the guaranty, notwithstanding the master also reports that no money was paid to the defendant nor any promise made to him of any money consideration. *Lent* v. *Padelford*, 10 Mass. 230. *Walker* v. *Sherman*, 11 Met. 170. *Johnson* v. *Wilmarth*, 13 Met. 416. The "protection" of the account, however, was the giving of security for its payment, and there was no express statement, or even an implied understanding upon the facts stated in the report, that suit would be brought if a guarantor was not promptly furnished.

While the contract, therefore, was not binding as an undertaking to pay the accrued account, the guaranty furthermore named no amount, and the burden of proof as the master correctly held rested on the plaintiff to offer competent evidence in support of the allegations of the second paragraph of the bill.* *Tenney* v. *Prince*, 4 Pick. 385. The master found, that the plaintiff failed to establish that Bernard E. Bloom was indebted to it at the date of the guaranty, and its exceptions to the report so far as argued relate to the exclusion of evidence, which it contends if admitted would have proved a sale and delivery of the goods.

The admissions of Bernard E. Bloom, in the absence of the defendant, that he had received goods to the amount named in

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* The allegations of the second paragraph of the bill were as follows: "On or about September 24, 1908, the said B. E. Bloom defaulted payment of the account due the plaintiff, and on or about September 25, 1908, and the plaintiff duly demanded that the defendant Abraham Bloom pay the amount due from the said B. E. Bloom to the plaintiff, which, at that time, amounted to $1,993.42. The defendant Abraham Bloom, in response to said demand, stated that he was unable to pay the amount at that time, and asked for an extension, which the plaintiff refused to grant."

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the account then presented to him were made after their alleged delivery, and, not having been communicated to the defendant, were correctly held to be inadmissible. *Evans* v. *Beattie*, 5 Esp. 26. *Dawes* v. *Shed*, 15 Mass. 6, 9. *McKim* v. *Blake*, 139 Mass. 593, 594.

The plaintiff also offered in evidence its books of account, kept in the usual course of business, as proof of the sale and delivery of the goods. *Costello* v. *Crowell*, 133 Mass. 352, 355. *Kaiser* v. *Alexander*, 144 Mass. 71, 78. If apparently there was no dispute as to whom credit was given, and the suppletory oath of the witness under whose supervision the books were kept was sufficient to prove the entries, the report states, that the entries were transcribed from temporary memoranda, and the clerks who made the memoranda had no knowledge of the sale and delivery, except upon information received from other clerks whose duties are not shown. The goods were sold and delivered by the plaintiff's servants, who were not called as witnesses, and, however elaborate or perfect the system may have been, neither the supervisor nor the entry clerks were possessed of such personal knowledge as would enable them to support the charges and prove delivery. *Kent* v. *Garvin*, 1 Gray, 148. *Gould* v. *Hartley*, 187 Mass. 561. The books of account not having been of themselves competent evidence, and the knowledge of the plaintiff's witnesses being derived solely from the entries appearing in them, the ruling of the master, that the books were not admissible, must be sustained. *Kent* v. *Garvin*, 1 Gray, 148. *Miller* v. *Shay*, 145 Mass. 162. *Gould* v. *Hartley*, 187 Mass. 561. *Allwright* v. *Skillings*, 188 Mass. 538, 541.

If through inadvertence the plaintiff neglected to offer evidence which would have supported its claim, it should have moved to recommit the report,* but having failed to

* The plaintiff in his brief had argued as follows: "Whether the above evidence [as to the book accounts] should be admitted or not, there are not sufficient facts before the court to grant the plaintiff's third prayer [which was that the equity of the defendant Bloom be sold and the debt to the plaintiff paid from the proceeds] in its present terms; but the case may be referred back to the master with instructions to determine what is due the plaintiff, or the first two prayers [that conveyance or foreclosure by Ziskend be enjoined and that the conveyance by the defendant Bloom be declared fraudulent] may be granted and the amount of liability left to be fixed by the common law suit now pending, and above referred to."

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prove either a valid guaranty, or any liability of the defendant under it, the bill cannot be maintained.

Decree affirmed.

RALPH E. FORBES & others *vs.* JAMES THORPE & others.

Suffolk. March 21, 22, 1911. — September 6, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Equity Jurisdiction, For an accounting, To relieve from results of fraud, To reach and apply equitable assets. *Fraud. Agency. Equity Pleading and Practice*, Appeal *in forma pauperis*, Cross bill. *Partnership. Corporation*, Liability in equity for results of fraud of partnership which corporation succeeds. *Statute of Frauds.*

If, in a suit in equity for an accounting against an agent who had undertaken by contract to sell certain personal property for the plaintiff, the contract providing that, if all the property was not sold by a certain date, the agent would purchase it at a price which with previous sales would yield the plaintiff not less than a certain value for which all of it had been appraised, it appears that the defendant in the performance of the contract and in its final settlement defrauded the plaintiff, and that in his dealings with the defendant the plaintiff acted with reasonable care under the circumstances, it is no ground for not affording relief to the plaintiff that, by constant and suspicious watching on his part, he might have discovered and have prevented the fraud.

In a suit in equity in the Superior Court against three persons, alleged to have been partners jointly participating in a fraud committed upon the plaintiff, and against a corporation which was alleged to have succeeded the partnership and to be chargeable with the results of the fraud, relief was granted against all of the defendants and they all appealed. At the hearing before this court one of the defendants did not file a brief either personally or through counsel as required by Rule 2 relating to practice before the full court, and did not appear in person or by counsel to argue his appeal. It was said by counsel for other defendants that he was without money to prosecute the appeal. Under such circumstances, *it was stated*, that, in the absence of a statute or rule definitely covering the case, the rule of English chancery practice ordinarily would prevail and the appeal would be dismissed; but *in the present case*, this court, expressly stating that the case should not be treated as a precedent, considered the appeal on its merits and dismissed it.

There never has been in this Commonwealth an instance of appeal *in forma pauperis*, which still is allowed in England, from a decree in a suit in equity. Per RUGG, J.

Joint ownership of property by several, use of it in a business, sharing of profits and division of net proceeds upon dissolution make the part owners partners in the business and liable for its losses as well as beneficiaries of its profits, in the absence of a specific agreement defining by express terms the status of the part owners.

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A partnership consisting of two partners made a contract with the owner of certain machinery to sell it for him. In the performance of the contract by the partnership the owner was defrauded, the prices at which sales had been made having been reported falsely to the owner and certain sales having been made that were not reported at all. One, who was a bookkeeper or clerk in the employ of the firm when the contract was undertaken, before its completion bought a part of the interest of one of the partners. Part of the fraudulent acts of the partnership were committed before and part after he acquired his interest. A general statement recapitulating the results of the frauds already committed by the original partners was prepared after the new partner acquired his share and the contract thereafter was treated by the firm in its accounts as a firm asset. It did not appear that the new partner participated in any way in the management of the business, but he continued to be connected with the partnership in a clerical capacity. A suit in equity by the defrauded owner against all three members of the partnership having been referred to a master who found the foregoing facts, it was *held*, that a decree granting the plaintiff relief against the third partner as well as against the first two was warranted.

Real and personal property with which the business of a partnership composed of two partners was conducted was held by one of them as trustee for the partnership. The partnership, in performing as agents a contract with the owner of certain goods for their sale, defrauded the owner. During the performance of the contract a third partner was added to the firm, who took no part in the management of the business but acted merely in a clerical capacity. Thereafter, by reason of pressure by an individual creditor of one of the partners, the partner who held the property as trustee and the other active partner by an instrument under seal conveyed all the business and assets of the partnership to an intermediary as trustee for the benefit of and pending the organization of a corporation, subject to "all the debts and liabilities of" the two active partners "contracted in or arising from or on account of" the business and property conveyed. After the charter of the corporation was issued the intermediary conveyed to the corporation what had been conveyed to him by an instrument under seal, with a clause subjecting the property conveyed to debts and liabilities incurred by the two active partners, and the conveyance to the corporation was upon condition that the corporation should pay and discharge "all and singular the indebtedness and liabilities of" the two active partners "contracted in or arising from or on account of the conduct of said business carried on under the name of" the partnership. The statement of debts furnished to the corporation did not include that arising out of the fraud in the performance of the contract above referred to, and no one but the two active partners knew of it and they had no reason to believe that it would be discovered. Capital stock was issued to the three partners and to the wife of one of them. *Held*, that the property right of the partnership to compel the corporation to perform its covenant as to payment of the partnership liabilities, not being one that could be attached at law, could be reached in a suit in equity by the person whom the partnership had defrauded, and that he might in such a suit against the partners and the corporation establish his claim against the partners and enforce payment of it by the corporation.

It is no defense to a suit in equity against a corporation to enforce on behalf of a creditor of a partnership which was the corporation's predecessor an agreement contained in a deed which was accepted by the corporation and which effected a conveyance to the corporation by the partnership of all its assets, to the effect that, in consideration of the conveyance to it, the corporation "assumes and

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covenants" to pay all the debts and liabilities of the partnership, that, because the corporation neither signed nor sealed the deed and it was not a contract to be performed within a year, the covenant was unenforceable because of the statute of frauds, R. L. c. 74, § 1, cl. 2, 5, the corporation having accepted and retained the property conveyed.

In a suit in equity it is correct practice for one defendant to bring to the attention of the court by a cross bill any rights he may have against a co-defendant growing out of the subject matter of the suit, so that justice may be done to all parties touching the cause of litigation by granting affirmative relief, if need be, between the several defendants.

Where, in a suit in equity by the owner of certain property against the members of a partnership who had agreed as agents to sell the property for him and against a corporation to which the partnership had conveyed all its property subject to a covenant by the corporation to pay all the debts and liabilities of the partnership, it appears that the plaintiff should be given the relief he seeks and that two of the members of the partnership had made misrepresentations to the corporation at the time of the transfer of the partnership property to it by failing to include the claim of the plaintiff in a schedule of their debts furnished to it, the corporation by a cross bill may have relief against the partners who had caused its loss by such misrepresentations.

It is not a proper function of a cross bill in equity to bring in new parties who are not essential to the case set out in the original bill.

In a suit in equity by the owner of certain property against the members of a partnership, who had agreed as agents to sell the property for him, and against a corporation to which the partnership had conveyed all its property subject to an agreement by the corporation to pay all the debts and liabilities of the partnership, it appeared that the plaintiff should be given the relief he sought and that two of the members of the partnership had made misrepresentations to the corporation at the time of the transfer of the partnership property to it by failing to include the claim of the plaintiff in a schedule of their debts furnished to it. The corporation filed a cross bill setting out the facts as to the misrepresentations of the partners who were its co-defendants and praying for relief against them, and at the hearing of an appeal by it from a final decree for the plaintiff, it sought for a modification of the decree to the effect that the conveyance by the partnership to the corporation should be set aside and that it should be allowed to assert its claim as a creditor against the property for the amount for which it was held liable to the plaintiff. It appeared that the case had not been tried upon such a theory before the final decree. *Held*, that the relief sought by the defendant at the hearing on appeal should be denied because it was not within the scope of the cross bill and because the case was not tried with such relief as an issue.

BILL IN EQUITY, filed in the Superior Court on February 12, 1906, and, after the sustaining of a demurrer, six times amended, with a supplemental bill and an amendment thereto, against James Thorpe, Charles E. Cashin, Thomas E. Wilde and the Jeremiah Clark Machinery Company, seeking an accounting by the defendants Thorpe and Cashin regarding the transactions described in the opinion, seeking to fix upon the defendant Wilde liability for the amount to be found due to the plaintiff

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from Thorpe and Cashin because of alleged partnership relations of the three, and also praying that the defendant corporation be ordered to pay to the plaintiffs what was found to be owing to them from the other defendants; also a

CROSS BILL by the Jeremiah Clark Manufacturing Company against Thorpe, Cashin and the plaintiffs setting out the terms of the transfer from the partnership to the corporation, described in the opinion, and alleging that before the original suit was brought one Giles Taintor acted at the same time as attorney for the original plaintiffs and for Cashin and obtained from Cashin information and assistance in the preparation of the case; that it was then the duty of Taintor and therefore of the original plaintiffs his clients, to protect Cashin against liability arising out of these disclosures and to advise Cashin that unless he received from the plaintiffs a release or agreement sufficient to relieve the corporation from liability under the original bill the corporation would have a right of indemnity and exoneration against Cashin as a party primarily liable on this claim, if the corporation had to pay it; that the plaintiffs through their attorney failed so to protect and advise Cashin and by suing Cashin and subjecting him to this liability, the plaintiffs became liable for any damages that might be incurred by him and were bound to indemnify and exonerate him from liability. The prayers of the cross bill were, (1) "that if the corporation is held liable under the original bill, Cashin, Thorpe and the plaintiffs in the original bill may be ordered to indemnify and exonerate the corporation from the same"; and (2) "that the obligation of the original plaintiffs to Cashin to exonerate him from liability on their claim be specifically performed for the benefit of the corporation and be applied in payment of any liability that may be imposed upon the corporation in the original bill."

The suit was referred to Franklin T. Hammond, Esquire, as master. The substance of his report is stated in the opinion.

The master's statement as to the transfer of the property of the partnership to the corporation was as follows:

"An indenture was drawn up and executed dated October 7, 1904, by which Thorpe and Cashin together with" the two who originally had owned interests in the business but who had

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sold out to Thorpe as stated in the opinion, "conveyed to one Pearson trustee 'for the benefit of and pending the proper organization of a corporation in the manner and upon the terms hereinafter more specifically set out' all the business and assets including all real estate of the firm known as the Jeremiah Clark Machinery Company subject however 'to all and singular the debts and liabilities of the grantors contracted in or arising from or on account of the granted premises as and when the same are or shall become payable or dischargeable respectively.' The conveyance was declared to be upon trust to convey all these assets to a new corporation to be formed and to be called the Jeremiah Clark Machinery Company 'subject to the debts and liabilities of the grantors as aforesaid which the corporation shall expressly assume and agree to pay or provide for.' And in consideration of the transfer and conveyance the corporation was to issue its capital stock to the order of the grantors in proportion to the interests which they owned in the property transferred. . . .

"Immediately upon the execution of this indenture steps were taken to organize the new corporation under the Massachusetts laws. The agreement of association was signed October 13, 1904. The meeting for organization was held on the same day and officers were elected. . . . On October 17, 1904, the charter was issued to the corporation under the name of the Jeremiah Clark Machinery Company.

"About the same time, October 17, 1904, Pearson the trustee executed an indenture stated to be made between him and the corporation, the Jeremiah Clark Machinery Company, by which in consideration among other things 'of the mutual promises and agreements herein made' Pearson conveyed to the corporation all the assets acquired by him under the conveyance of October 7 subject to all 'the debts and liabilities of James Thorpe and Charles E. Cashin contracted in or arising from or on account of the business and property hereby transferred and conveyed as and when the same are or shall become payable or dischargeable respectively.' The indenture further provided that in consideration of this transfer the corporation 'hereby assumes and covenants to pay and discharge all and singular the debts and liabilities of James Thorpe and Charles E. Cashin contracted

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in or arising from or on account of the conduct of the said business carried on under the name of the Jeremiah Clark Machinery Company as and when the same are or shall become payable or dischargeable respectively . . . but the grantee hereby expressly repudiates and refuses to pay or in any way provide for any debts or liabilities contracted or incurred by James Thorpe or by Charles E. Cashin outside of the said business heretofore carried on under the name of the Jeremiah Clark Machinery Company.'"

Exceptions of the defendant corporation to the master's report were heard by *Pierce*, J., who overruled them; and a final decree was entered that the defendants Thorpe, Cashin, Wilde and the Jeremiah Clark Machinery Company "are jointly and severally liable to the plaintiff in the sum of $17,943.08, and that the said defendants jointly and severally pay to the plaintiffs the said sum with interest from the date of this decree" together with costs of suit, "and that the cross bill of the defendant Jeremiah Clark Machinery Company be dismissed as against the original plaintiffs, and that the defendants Cashin and Thorpe are liable to the defendant Jeremiah Clark Machinery Company under the cross bill of the latter in damages in the sum of $926.91, and that execution issue therefor and that the defendant the Jeremiah Clark Machinery Company deliver to the plaintiffs the articles found by the master to be the property of the plaintiffs and in the possession of the said defendant."

The defendants appealed.

Other facts are stated in the opinion.

G. Taintor, for the plaintiffs.

S. R. Wrightington, for the defendant corporation.

RUGG, J. The material facts upon which this suit is founded are that the defendants, Thorpe and Cashin, with two associates, were the owners of a second-hand machinery business conducted under the name "Jeremiah Clark Machinery Company." Conveyance of real estate and personal property, with which this business was conducted, was made to Thorpe, who executed a declaration of trust to the effect that he held the title equally for the benefit of Cashin, himself and two others, each of whom had contributed $6,000 to the purchase price. Subsequently, but before the events here complained of, Thorpe purchased the interest of these last two, and they now have no connection with

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this case. In January, 1904, Cashin sold one sixth of his interest in the property and business and its profits to the defendant Wilde, Thorpe consenting to this transfer. No articles of copartnership were ever drawn up between Thorpe and his associates, but they considered that the business was being conducted as a partnership, Thorpe and Cashin being actively engaged in its prosecution all the time, while Wilde after purchasing his interest (which was in January, 1904, during the course of dealings complained of in this suit) was connected with the business in a clerical capacity. The plaintiffs were a committee of bondholders of the Simonds Rolling Machine Company, which had acquired title to a factory and its contents, consisting of a large amount of machinery and stock. In June, 1902, they entered into a contract with the Jeremiah Clark Machinery Company to sell the property for not less than designated prices on a commission basis, with a guaranty of purchase by the partnership on April 1, 1904, if not sold before, at a price which should yield the plaintiffs with previous sales not less than the appraised value. Immediately after the execution of this contract (as found by the master) Thorpe with the knowledge and participation of Cashin "entered upon a deliberately conceived scheme to defraud the plaintiffs by selling their property at prices far above those which he reported to the plaintiff and taking the difference for the partnership." A final statement and apparent end of this scheme was made on April 20, 1904, but minor ramifications of the fraud continued to October, 1904. As a result the plaintiffs were defrauded of a sum considerably in excess of $10,000. By reason of pressure by one of Thorpe's individual creditors, and at his suggestion in October, 1904, the Jeremiah Clark Machinery Company, a corporation, was organized to acquire all the assets of the firm which had done business under the same name. As steps in the execution of this plan, a conveyance was made to an intermediary named Pearson, who, immediately after the charter of the corporation was issued, executed a like conveyance to it of all the assets of the partnership, subject to "all the debts and liabilities of James Thorpe and Charles E. Cashin contracted in or arising from or on account of the business and property conveyed," and the conveyance to the corporation was upon condition that it should pay and discharge "all and singular the indebted-

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ness and liabilities of James Thorpe and Charles E. Cashin contracted in or arising from or on account of the conduct of said business carried on under the name of the Jeremiah Clark Machinery Company." The value of the property so conveyed was slightly in excess of $30,000 and the partnership debts, aside from those to the plaintiffs by reason of the frauds committed on them, about $8,200, of which about $1,700 was on notes held by Thorpe, which were subsequently cancelled and nothing paid on them. The statement of debts furnished to the corporation did not include those arising out of the frauds committed on the plaintiffs. The capital stock of the corporation was $24,000, of which certificates for one hundred and eighty shares of the par value of $100 each were issued to Thorpe, who assigned them to his creditor as collateral for his private debt, for ten shares to Wilde, for fifteen shares to Cashin, and for thirty-five shares to Cashin's wife. Immediately after the organization of the corporation and its vote to accept the conveyance of property from Pearson in return for the issue of stock, the officers resigned, and Thorpe and Cashin were elected respectively vice-president and general manager and two of a board of three directors. The master has found that the conveyance to the corporation was not according to the desire of Thorpe and Cashin, but was forced upon them by the creditor of Thorpe, but that they at that time had no good reason to believe that their fraud upon the plaintiffs would ever be detected, and hence that in the conventional sense they had no actual intent to defraud their creditors in making the conveyance, nor did Pearson or the corporation participate in any plan to defraud the creditors of the partnership in receiving the conveyance, for the reason that both conveyances made express provision for the payment of the firm debts by the corporation, and that but for such provision the conveyance would have been a fraud upon the firm creditors.

1. The partnership was liable to the plaintiffs for the frauds committed against them. All the sales of machinery and stock made by the partnership as agents for the plaintiffs and the purchases made by the partnership at the end under the guaranty clause of the contract with the plaintiffs were so tinctured with fraud that the plaintiffs were entitled to full relief as soon as the wrong they had suffered was discovered. It is too late in

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the history of law to argue successfully that reasonable reliance upon representations which turn out to be fraudulent must go without relief because the sharpest distrust might have discerned the wrong. It is no ground for not affording relief to the plaintiffs that it would have been possible for them by constant and suspicious watching to have discovered that they were being defrauded. So long as they acted reasonably they have a right to protection. Whether the partnership might have bought machinery under the agreement with the plaintiffs without disclosure of its personal interest is of no consequence in this connection. It did not profess so to buy in most instances, but it deceived the plaintiffs by representing that it was selling as an agent, and also grossly deceived them as to the amount of stock sold.

2. Wilde filed an appeal in the Superior Court from the decree there entered against him. He presented no brief in this court, either personally or through counsel, as required by Rule 2, nor did he appear in person or by counsel to argue his appeal. It is plain that under the English chancery practice, where the appellant does not appear in the court to which the appeal is taken at the time set down for argument, the appeal is dismissed. *Martin* v. *D'Arcy*, 8 H. L. Cas. 698. *Honeyman* v. *Marryatt*, 6 H. L. Cas. 112. *Scanlan* v. *Usher*, 8 Cl. & F. 561. *Sherburne* v. *Middleton*, 9 Cl. & F. 72. *Murphy* v. *Conway*, 9 Cl. & F. 73. There is no statute or rule definitely covering the matter in this Commonwealth. Therefore, the general principles of chancery practice prevail. It was stated in argument at the bar by counsel for other defendants that Wilde was without money to prosecute his appeal. So far as we know, there has never been an instance in this Commonwealth permitting an appeal *in forma pauperis*. Social conditions and the practice respecting costs and the bonds required as security for appeals in this Commonwealth have made inapplicable the rule in this regard which still prevails in England. *Drennan* v. *Andrew*, L. R. 1 Ch. 300. *Biggs* v. *Dagnall*, [1895] 1 Q. B. 207. *Kiff* v. *Roberts*, 33 Ch. D. 265. We proceed to consider the appeal of Wilde upon its merits without intending that this shall be treated as a precedent for future cases.

Wilde was not a member of the partnership at the inception

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of the scheme by which the plaintiffs were defrauded. He is described by the master in one place in the report as a clerk in the employ of the firm, and at another place as bookkeeper. The master makes no finding as to whether he knew of the fraud upon the plaintiffs by Thorpe and Cashin, but if "clerk" and "bookkeeper" were used by the master as synonymous, the inference would be almost irresistible that he knew of it. It does not appear that he participated in any way in the management of the business. He bought one sixth of the interest of Cashin, and he thereby became possessed of one twenty-fourth interest in the whole property, and was a beneficiary under the trust agreement, upon the basis of his interest in which shares in the corporation were issued to him. He appears to have been treated as a partner by an entry upon the books of the partnership showing the transfer to him of the interest in the business. Although his name was omitted from the transactions incident to the transfer of the property to the corporation, this does not affect his rights, as he shared in the stock issued for it to the extent of his interest. The declaration of trust plainly indicates that the property was intended to be used in the machinery business, and all the profits accruing from it were to be distributed among the beneficiaries. Joint ownership of property, use of it in a business, sharing of profits and division of net proceeds upon dissolution constitute the part owners partners in the business and liable for its losses as well as beneficiaries of its profits in the absence of a specific agreement defining by express terms the status of the part owners.

Although a part of the frauds of which the plaintiffs complain had been perpetrated before he came into the partnership, some were consummated afterwards, and a general statement recapitulating in detail all the earlier fraudulent transactions was prepared in behalf of the firm, and made the basis of the final settlement between it and the plaintiffs after he became a partner. This statement was made about a month before the time when, under the original contract between the plaintiffs and the firm made in June, 1902, the latter was required to complete the sale and make good its guaranty of purchase. This shows that the contract was treated by the firm of which Wilde was a member as a part of its assets, and its obligations as a part of the firm

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liabilities. Although the master does not describe any more in detail the relation of Wilde to the business, there is enough in these circumstances and in the absence of any other limiting findings to support the decree against him. *Kingman* v. *Spurr*, 7 Pick. 235. *Phillips* v. *Blatchford*, 137 Mass. 510. *Gleason* v. *McKay*, 134 Mass. 419. *Hoadley* v. *County Commissioners*, 105 Mass. 519. *Williams* v. *Boston*, 208 Mass. 497.

3. The conveyance of the property to the defendant corporation was upon the express condition that it should assume and pay all the liabilities incurred by Thorpe and Cashin in the conduct of the business under the name of the Jeremiah Clark Machinery Company. This business had been conducted as a continuing entity without a break from the time it was established by the purchase of the property conveyed to Thorpe as trustee until the corporation was organized. Thorpe and Cashin were the owners who had conceived and executed the fraud upon the plaintiffs. They had been all the time, during the changes in the ownership of interests in the partnership property, the active managers of the business, which had throughout its existence been conducted under the impersonal name assumed by the corporation. If it had been the main purpose of the instrument by which the property was transferred to the corporation to express an obligation on part of the corporation to assume all the outstanding debts, which the conduct of the business had incurred under the management of Thorpe and Cashin, assuming that the retirement of the earlier partners and the admission of Wilde had constituted different copartnerships, it would have been difficult to conceive language more apt. The plain words of the covenant include liability for all the frauds committed by the two active partners as a part of their management of the copartnership. The obligation thus incurred by the corporation was sweeping and without exception. It was made upon a valuable consideration. It is this circumstance which prevents the conveyance to it from having been made in fraud of the rights of creditors of the partnership. Without some provision looking to this end, the finding of the master was, and correctly so, that the transfer would have been a fraudulent one. It would be plainly in fraud of creditors for a debtor to convey all his property to a corporation, taking in pay therefor certificates of stock which

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are pledged to a specified creditor, without making any provision for the payment of general indebtedness. Under these conditions the plaintiffs can maintain a suit in equity to enforce the covenant made for their benefit, although no direct consideration moved from them, and there was no privity of contract between them and the corporation. The defendant corporation has obtained property by virtue of the conveyance, of which the covenant is a part, which in equity and good conscience ought to be held to the satisfaction of the plaintiffs' claim. *Mellen* v. *Whipple*, 1 Gray, 317, 322. *Lincoln* v. *Burrage*, 177 Mass. 378. *Paper Stock Disinfecting Co.* v. *Boston Disinfecting Co.* 147 Mass. 318.

This is not a case where the corporation seeks to set aside a sale induced by fraudulent representations. It would be obliged then to proffer return of the property acquired by the sale. But it is a case where the corporation undertakes to retain all the property acquired by the sale and at the same time avoid the payment of the debts which it agreed to pay as a part of the purchase price simply because the amount of the debts was misrepresented. It cannot keep the advantages of the transaction and avoid its obligation.

This is not one of the cases, which sometimes have been called anomalous in their nature, where the promise from the corporation to Pearson or the partnership for the benefit of the plaintiffs was sufficiently explicit to enable them to bring an action at law in their own names. *Dow* v. *Clark*, 7 Gray, 198. *Exchange Bank* v. *Rice*, 107 Mass. 37. *Frost* v. *Gage*, 1 Allen, 262. *Clare* v. *Hatch*, 180 Mass. 194. *Attorney General* v. *American Legion of Honor*, 206 Mass. 158, 166. *Dean* v. *American Legion of Honor*, 156 Mass. 435, 438. *Union Institution for Savings* v. *Phoenix Ins. Co.* 196 Mass. 230. Moreover, the contract for the assumption of the debt being under seal, no one save a party to it could maintain an action on it. *Boyden* v. *Hill*, 198 Mass. 477, 487.

It is not necessary to determine whether the terms of the conveyance definitely established a trust for the benefit of creditors, which enabled each of them to demand performance, (*Boston* v. *Turner*, 201 Mass. 190, 194, 195, and cases cited,) nor whether the partners had an equitable lien upon the partnership assets to

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the extent of requiring the payment of debts, which creditors may enforce for their own benefit in the name of the partners (*Howe* v. *Lawrence*, 9 Cush. 553, 558. *Harmon* v. *Clark*, 13 Gray, 114, 121). The liability of the corporation to the plaintiffs may be worked out in another way. The contract being made by the firm for the benefit of their creditors, the latter may enforce in equity the rights of the copartners to compel the corporation to perform its agreement in this regard. This is a property right not subject to attachment which can be reached in equity and made available for the benefit of the creditor.

It is no answer to this claim for the corporation to say that as against the partners it can set up their fraudulent representations as to the amount of the debts, and that, as this proceeding enforces the agreement made with the partnership, the same defense is open against everybody who sues under this agreement, for the reason that it holds title to the property under the terms of a contract conditioned to pay all debts. It has no other title to its possession except the contract. If the corporation stands on its contractual rights it must stand on the whole of them. It cannot assert that part of the contract which turns out to be for its gain, and reject that which causes it loss. Resting its title to the property of the partnership upon a conveyance which but for the agreement for the payment of debts would be fraudulent and thus liable to be set aside, it cannot put forward as against creditors enforcing performance of this agreement damages sustained by it through misrepresentations as to the amount of debts, although this might be open to it in an action where the partners and it alone were concerned. To permit such a defense would enable the corporation to retain the property in fraud of firm creditors as effectually as if conveyed to it without any obligation to pay them. The substance of the transaction then would be a plain conveyance in fraud of creditors. Equity does not suffer itself to be circumvented by specious devices. It looks through the form to the substance, and deals with things as they are, regardless of disguises. A chain of reasoning is not sound which leads to a result claimed by the defendants. An agreement induced by misrepresentations ordinarily is not enforced in equity. But where the agreement ought to be set aside as fraudulent unless specifically performed and the defend-

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ant elects to assert the validity and claim the fruits of the contract, there can be no just complaint against performance according to its terms.

It is not necessary to consider whether the sale was voidable because not in compliance with the statute relating to sales of merchandise in bulk. St. 1903, c. 415.

4. There is nothing in the argument of the corporation that the statute of frauds is a defense to it because the indenture of transfer appears not to have been signed by it, and thus it has not agreed in writing to answer for these debts, and also that the agreement was not to be performed within one year. It accepted and holds property, which was conveyed upon condition. The sale of the property cannot stand except upon performance of the condition.

5. The defendant corporation filed a cross bill seeking, if it should be held liable to the plaintiffs, to establish its damages against its co-defendants, Thorpe and Cashin, arising from their misrepresentations to it as to the amount of the indebtedness of the copartnership, and also to establish a breach of the covenant of title in the conveyance from them through the intermediary to it, and further to be subrogated to whatever rights Cashin may have against the original plaintiffs.

It is correct practice for one defendant to bring to the attention of the court by a cross bill any rights he may have against a co-defendant as well as against the plaintiffs growing out of the subject matter of the suit, so that justice may be done to all parties touching the cause of action in litigation by granting affirmative relief, if need be, between several defendants. *Morgan's Co.* v. *Texas Central Railway*, 137 U. S. 171, 200. Upon the findings made by the master it is plain that Cashin has no claim against the plaintiffs. The fact that the defendant corporation is held liable for the plaintiffs' debt constitutes no breach of the warranty of title in the conveyance of the property. The defendant is entitled to relief against Thorpe and Cashin for the damages sustained by it through the misrepresentation as to the amount of the debts of the partnership, and the decree should be modified to this extent. This is in accordance with the master's report.

6. The defendant corporation complains that there was error

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in overruling its motion that the plaintiff be required to join Mrs. Cashin as a party to the suit, in order that it might file a cross bill against her. She was not a necessary party to the cause of action set out in the plaintiffs' bill. They asked no relief against her, and she had no interest in the subject matter they were litigating, except such as she might have as a stockholder in the defendant corporation, and in that regard she was represented by the corporation. It is not a proper function of a cross bill to bring in new parties not essential to the case set out in the bill of complaint. The defendant corporation can try whatever causes of action it has against her in another proceeding without reference to these plaintiffs or to this cause of action.

7. The defendant corporation urges that the conveyance should be set aside and that it be allowed to assert its claim as creditor against the property for the amount for which it is held liable. Without adverting to other objections, it is enough to say that this is not within the scope of its cross bill, and is not the theory upon which the case has been tried.

Other arguments presented in defense which have not been discussed are not regarded material.

The result is that no error is disclosed, except that the portion of the decree relating to the defendant corporation's cross bill should be modified so as to include in addition to the damages there established against Thorpe and Cashin the damages sustained by reason of their misrepresentation as to the amount of firm indebtedness assumed by it, and as so modified is affirmed with costs.

So ordered.

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JOHN B. RHINES, executor, *vs.* GEORGE L. WENTWORTH, administrator with the will annexed.

GEORGE L. WENTWORTH, administrator with the will annexed, *vs.* AVIS E. RHINES, executrix.

Norfolk. March 28, 1911. — September 6, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Executor and Administrator. Equity Jurisdiction, Protection of property from apprehended conversion.

A testatrix, by the fourth article of her will, devised and bequeathed the residue of her estate to her brother "to have and to hold, use and improve the same, without the intervention of any trustee, for and during his natural life; and on his decease I give, devise and bequeath whatever may then be remaining of said rest and residue and accumulations, if any, to said town of W," to be used for public purposes. The brother of the testatrix was made executor of the will. He died without rendering any probate account, and after his death an account of his administration of his sister's estate was presented to the Probate Court in which he was credited with the amount of the "rest and residue paid over, transferred and delivered" to himself "as residuary legatee under article fourth of will." The Probate Court made a decree allowing the item. On an appeal from the decree there was no extrinsic evidence. *Held*, that the beneficiary was entitled as trustee in his own behalf to the possession and control of the principal of the personal property of his sister's estate with the right of unrestricted expenditure of the income, that a decree of distribution for the transfer of the property was unnecessary, as the allowance of the account in which the executor was credited with the transfer of the residue to himself had the same effect as a decree of distribution, and that the decree allowing the account should be affirmed.

An action at law will not lie against an executor for the alleged conversion of the residue of the personal estate of his testator by transferring it to himself as residuary legatee, if it appears by the declaration that the question of the legality of such transfer is pending in the Probate Court in the proceedings upon the allowance of the executor's account, in which all persons interested in the estate have the right to appear. If an interested person is apprehensive that, before the account is passed upon, the property for which the executor is bound to account may be wasted or converted, his remedy is by a bill in equity.

APPEAL from a decree of the Probate Court of the County of Norfolk, made by *Flint*, J., on December 15, 1909, allowing the first and final account of John B. Rhines, as executor of the will of Helen M. Rhines, filed by Avis E. Rhines, the executrix of the will of John B. Rhines, and

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CONTRACT OR TORT by the administrator *de bonis non* with the will annexed of the estate of Helen M. Rhines against the executrix of the will of John B. Rhines, with a count in contract for $35,000, referring to an annexed copy of the will of Helen M. Rhines, and a count in tort for an alleged conversion of certain securities, named in an annexed schedule, amounting to $35,804.87, an allegation being added by amendment that both of the counts were for the same cause of action. Writ dated October 13, 1908.

In the first case the appeal was heard by *Sheldon*, J., who made a final decree affirming the decree of the Probate Court, from which the respondent, who was the plaintiff in the second case, appealed.

The declaration in the second case is described more fully in the opinion. The will of Helen M. Rhines, of which a copy was annexed to the declaration, was dated December 21, 1895, and was proved on May 24, 1899. By the first article John B. Rhines, the brother of the testatrix, was named as executor with a request that he be not required to furnish any security on his bond as such executor. The second article gave legacies to a charity and to various persons. The third article gave to John B. Rhines a legacy of $5,000 and also devised to him a certain lot of land in Weymouth. The fourth article was as follows:

"Fourth. I also give, devise and bequeath to my said brother all the rest and residue of my said estate, real, personal and mixed, including herein my homestead in said Weymouth with the buildings and land belonging thereto, formerly occupied by our late father and devised by him to me, to have and to hold, use and improve the same, without the intervention of any trustee, for and during his natural life; and on his decease I give, devise and bequeath whatever may then be remaining of said rest and residue and accumulations, if any, to said town of Weymouth, to be appropriated for the construction, on the site of my said homestead, in memory of my father, the late John C. Rhines, of a public building, to be used for such purposes as said town may decide to be advisable. If, on the decease of my brother there should not be, in the judgment of the town, sufficient for the purpose above stated, it is my will that the property should accumulate till there be a sufficiency and then my plan be carried out."

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Here followed the attesting clause.

The defendant demurred to the declaration, assigning four causes of demurrer, of which the second and third were as follows:

"2. For cause of demurrer to the said declaration the defendant says that it appears therefrom that the accounts of said John B. Rhines as executor of the will of said Helen M. Rhines, although filed by the defendant, have not yet been settled in said Probate Court for said County of Norfolk, and the claims and 'right of retainer' of said John B. Rhines against the estate of said Helen M. Rhines have not yet been determined.

"3. For cause of demurrer to the said declaration the defendant says that it appears therefrom that the plaintiff's remedy, if any, is by a bill in equity and not by an action of law."

By an order made on January 30, 1909, *Richardson*, J., sustained the demurrer on the second and third grounds specified. On November 14, 1910, *Pierce*, J., ordered that judgment be entered for the defendant. From the judgment entered in accordance with this order the plaintiff appealed.

C. E. Shattuck, for Avis E. Rhines, executrix.

O. Storer, (*G. L. Wentworth* with him,) for George L. Wentworth, administrator with the will annexed.

BRALEY, J. By the fourth clause of her will, Helen M. Rhines devised and bequeathed the residue of her estate including her homestead and land thereto belonging, to her brother John B. Rhines, "to have and to hold, use and improve the same, without the intervention of any trustee, for and during his natural life; and on his decease I give, devise and bequeath whatever may then be remaining of said rest and residue and accumulations, if any, to said town of Weymouth" to be used for public purposes. John B. Rhines, who also was the executor of the will, having died without rendering any probate account, Avis E. Rhines, the executrix of his will, presented for allowance the account of his administration of the estate, in which she asked to have allowed the amount of the "rest and residue paid over, transferred and delivered to John B. Rhines as residuary legatee under article fourth of will." The account was allowed in the Probate Court, and, the decree having been af-

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firmed by a single justice of this court, the case is before us on an appeal which contains no extrinsic evidence,* the appellant relying only on the reasons of appeal from the probate decree, that the allowance of this item was improper.

We assume, that the real property has not been disposed of and that upon the death of the life tenant the town was entitled to possession, if it chose to accept the devise. The item in dispute relates wholly to personalty which came into the possession of John B. Rhines as executor, and then was transferred to himself. If the testator has not expressed an intention to the contrary, there is an implied trust in a gift of personal property, where the legatee takes the income only with a remainder over, and the property should be held by a trustee, or, if none is appointed, by the executor as trustee. *Hooper* v. *Bradbury*, 133 Mass. 303, 307. The testatrix, however, distinctly declares, that her brother during his life is to have the enjoyment of the personal property without the intervention of a trustee, while the fund with the accumulations, if any, at his death is bequeathed to the town. The gift was not absolute but qualified by the purpose of the testatrix to create a trust without making any distinction between the personal and real estate. The beneficiary was entitled as trustee in his own behalf to the possession and control of the principal with the right of unrestricted expenditure of the income. See *Homer* v. *Shelton*, 2 Met. 194, 206; *Howland* v. *Howland*, 100 Mass. 222; *Taggard* v. *Piper*, 118 Mass. 315; *Chase* v. *Chase*, 132 Mass. 478; *Sherburne* v. *Sischo*, 143 Mass. 439, 442, and *Thissell* v. *Schillinger*, 186 Mass. 182. The formality of a decree of distribution was unnecessary before he could receive the property. Under R. L. c. 150, § 19, payment of a legacy, or the transfer of a portion of the estate to a trustee, or to a legatee who is to act as his own trustee, may be stated in the accounts of an executor, and the allowance of the account has the same effect as a decree of distribution under the statute. *Palmer* v. *Whitney*, 166 Mass. 306. *Lamson* v. *Knowles*, 170 Mass. 295, 297. *Libby* v. *Todd*, 194 Mass. 507, 512.

The declaration in the action at law sets out a copy of the

* The final decree made by the single justice contained a recital that no testimony was offered by either party, and that the allowance of the item as to the transfer of the residue was the only matter in controversy.

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will, and contains a count in contract alleging, that the residue, having been held in trust, still remains to be administered, and that, although the defendant has filed an account of her testator, which is still pending for allowance, the account only shows a pretended disposition of the property, and she owes the plaintiff the residuary amount which came into his possession as executor of the will of his sister. The second count, with an averment that both counts are for the same cause of action, alleges, that the defendant's testator converted the property to his own use, and the act of conversion relied on, is the transfer by the executor to himself as legatee. If the property was wrongfully transferred, the plaintiff may recover it for the benefit of the town. *Flynn* v. *Flynn*, 183 Mass. 365, 366. But the defendant is not charged with the administration of the testatrix's estate, and if there are assets which the defendant's testator has not accounted for, she would be liable only upon the settlement of his probate account. *Tallon* v. *Tallon*, 156 Mass. 313, 315. *Foster* v. *Bailey*, 157 Mass. 160. *Green* v. *Gaskill*, 175 Mass. 265, 269. *Flynn* v. *Flynn*, 183 Mass. 365, 367. The question, whether the action of the executor was authorized by the terms of the will was involved and would have to be determined, and the plaintiff as the representative of the estate had the right to appear and be fully heard. *Thayer* v. *Kinsey*, 162 Mass. 232, 235.

The second ground of demurrer, therefore, having been well taken, the other causes assigned need not be considered. If the plaintiff was apprehensive, that, until the account had been passed upon, the stocks and securities enumerated in the schedule annexed to the declaration, if in the possession and control of the defendant, might be wasted or converted, he should have brought a bill in equity for their preservation. *Holmes* v. *Holmes*, 194 Mass. 552, 556. But under our decision in the first of the cases at bar the defendant's liability is dependent upon the conversion, if any, by John B. Rhines of the trust estate after he received it from himself as executor.

In the first case, the decree of the Probate Court, and in the second case, the judgment in favor of the defendant, must be affirmed.

So ordered.

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AMERICAN SPIRITS MANUFACTURING COMPANY *vs.* CHAUNCY ELDRIDGE & others.

Suffolk. March 23, 24, 1911. — September 6, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Corporation, Liability of stockholder. *Contract*, What constitutes. *Equity Pleading and Practice*, Parties.

A statute of another State, providing for the incorporation of associations "organized for the purpose of constructing railways, maintaining and operating the same," contained the following provision: "Each stockholder of any corporation formed under the provisions of this act shall be held individually liable to the creditors of such corporation to an amount not exceeding the amount unpaid on the stock held by him, for any and all debts and liabilities of such corporation, until the whole amount of the capital stock of such corporation so held by him shall have been paid." *Held*, that one, who voluntarily became an original stockholder in such a corporation and did not pay for his shares, was liable to a creditor of the corporation, in an action of contract brought in this Commonwealth, on proof of those facts and of the debt of the corporation to the plaintiff, although the plaintiff had obtained no judgment against the corporation, the liability being made direct by the statute and not enforceable through the corporation.

In a suit in equity under R. L. c. 159, § 8, cl. 7, to reach and apply equitable assets in the hands of divers defendants alleged to be held for the benefit of the principal defendant, it appeared that the debt from the principal defendant consisted of his liability under a statute of another State as a stockholder of a corporation organized in that State to the plaintiff as a creditor of such corporation, and that the language of the statute made the principal defendant directly liable to the plaintiff on proof that the plaintiff was such a creditor of the corporation and that the principal defendant was a stockholder who had not paid for his shares, without showing that any judgment had been obtained against the corporation. *Held*, that neither the corporation nor other delinquent stockholders were necessary parties to the suit, and that there was no occasion for the appointment of a receiver to wind up the affairs of the corporation and distribute its assets, so that the plaintiff could have recovered from the principal defendant in an action of contract, had not the reaching and application of equitable assets given ground for equitable relief.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 3, 1910, under R. L. c. 159, § 8, cl. 7, by the American Spirits Manufacturing Company, a corporation organized under the laws of the State of New York, against Chauncy Eldridge of Needham, William H. Tucker, S. Reed Anthony and Nathan Anthony of Boston, Philip L. Saltonstall of Milton, the Binghamton Light, Heat and Power Company, a corpora-

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tion organized under the laws of the State of New York, the Northwestern Power Company, a corporation organized under the laws of the State of Maine, the Hartford and Springfield Street Railway Company, a corporation organized under the laws of the State of Connecticut, the Manchester Traction, Light and Power Company and the Manchester Street Railway Company, corporations organized under the laws of the State of New Hampshire.

The allegations and prayers of the bill were as follows:

"1. And the plaintiff says that the Peoria Belt Railway Company is a corporation organized on or about September 5, 1901, under an act of the General Assembly of the State of Illinois, entitled 'An Act to provide for the incorporation of associations that may be organized for the purpose of constructing railways, maintaining and operating the same; for prescribing and defining the duties and limiting the powers of such corporations when so organized; and authorizing the same and all railroad companies of this State to own and hold the stock and securities of railroad companies of other States owning connecting lines,' having a capital stock of $100,000, divided into one thousand shares of the par value of $100 each; and that at some time to the plaintiff unknown, but before February 1, 1902, the said Peoria Belt Railway Company issued nine hundred and ninety-four shares of its capital stock to the defendant, Chauncy Eldridge, and the defendant Chauncy Eldridge has, since the time when said shares of stock were issued to him, continuously held said shares and still holds them; and from some time before February 1, 1902, to the present time the defendant Chauncy Eldridge has continuously been a stockholder of the Peoria Belt Railway Company; and the plaintiff says that neither the defendant Chauncy Eldridge at any time, nor any person on behalf of the defendant Chauncy Eldridge, or for his account, paid to the Peoria Belt Railway Company any money, or any property of value, or any amount whatsoever, for or on account of the stock issued to or held by the defendant Chauncy Eldridge in the Peoria Belt Railway Company, as aforesaid; and the Peoria Belt Railway Company has not at any time received from any source whatever any money, or any property of value for or on account of the shares of stock in the Peoria Belt Railway Company issued to or held

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by the defendant Chauncy Eldridge, and the shares of stock in the Peoria Belt Railway Company issued to or held by the defendant Chauncy Eldridge have not been paid; and the plaintiff says that on or about February 1, 1902, the plaintiff and the said Peoria Belt Railway Company entered into a certain contract [a copy of which was annexed to the bill and incorporated by reference], whereby the plaintiff, in consideration of the promises of the Peoria Belt Railway Company, leased to the Peoria Belt Railway Company certain premises as described in said agreement, to have and to hold from the first day of February, 1902, to the twenty-third day of July, 1912, on the terms and conditions stated in said agreement; and the Peoria Belt Railway Company, in consideration of the said lease and of the promises of the plaintiff set forth in said agreement, agreed to pay to the plaintiff, as rent for the demised premises, the sum of $60,911.23, in instalments, all as set forth in said agreement, and made certain other promises with reference to the occupation and use of said premises; but although all times have elapsed, and conditions happened, and all things on the plaintiff's part to be done to entitle it to the performance of the promises of the Peoria Belt Railway Company under the said agreement have been done, yet the Peoria Belt Railway Company has neglected and refused, and still neglects and refuses, to fulfil its promises as stated in said agreement, to the great damage of the plaintiff, and especially has neglected and refused, and still neglects and refuses, to pay to the plaintiff the moneys in the nature of rent which have become due since January 16, 1909, amounting to $9,610; and the plaintiff says that under the statute of the State of Illinois hereinbefore referred to it is provided (§ 16) [§ 17] 'Each stockholder of any corporation formed under the provisions of this act, shall be held individually liable to the creditors of such corporation to an amount not exceeding the amount unpaid on the stock held by him, for any and all debts and liabilities of such corporation, until the whole amount of the capital stock of such corporation so held by him shall have been paid,' and under the laws of the State of Illinois each stockholder of the Peoria Belt Railway Company is severally, individually, and directly liable to each creditor of the Peoria Belt Railway Company to an amount not exceeding the amounts unpaid on the stock held

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by him; and the amount unpaid on the stock in said Peoria Belt Railway Company held by the defendant Chauncy Eldridge is $99,400; and the obligation of the Peoria Belt Railway Company under the said agreement was on February 1, 1902, and at all times since has been, a debt and liability of the Peoria Belt Railway Company; and the defendant Chauncy Eldridge owes the plaintiff the amount due to the plaintiff from the Peoria Belt Railway Company under the said agreement.

"2. The defendants Chauncy Eldridge, William H. Tucker, S. Reed Anthony, Nathan Anthony and Philip L. Saltonstall, as copartners, are engaged in business as bankers and brokers in said Boston under the name and style of Tucker, Anthony and Company, and have partnership property of large value, the exact nature of which is to the plaintiff unknown, and the interest of the defendant Chauncy Eldridge in said partnership property cannot be come at to be attached or taken on execution in an action at law.

"3. The defendant Chauncy Eldridge owns stock, bonds, or other interest in the defendant Binghamton Light, Heat and Power Company, and the interest of the defendant Chauncy Eldridge in said stock, bonds, or other interest cannot be come at to be attached or taken on execution in an action at law.

"4. The defendant Chauncy Eldridge owns stock, bonds, or other interest in the defendant Northwestern Power Company, and the interest of the defendant Chauncy Eldridge in said stock, bonds, or other interest cannot be come at to be attached or taken on execution in an action at law.

"5. The defendant Chauncy Eldridge owns stock, bonds, or other interest in the defendant Hartford and Springfield Street Railway Company, and the interest of the defendant Chauncy Eldridge in said stock, bonds, or other interest cannot be come at to be attached or taken on execution in an action at law.

"6. The defendant Chauncy Eldridge owns stock, bonds, or other interest in the defendant Manchester Traction, Light and Power Company, and the interest of the defendant Chauncy Eldridge in said stock, bonds, or other interest cannot be come at to be attached or taken on execution in an action at law.

"7. The defendant Chauncy Eldridge owns stock, bonds, or other interest in the defendant Manchester Street Railway

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Company, and the interest of the defendant Chauncy Eldridge in said stock, bonds, or other interest cannot be come at to be attached or taken on execution in an action at law.

"Wherefore the plaintiff prays,

"1. That his debt against the defendant Chauncy Eldridge may be established and declared."

There were thirteen other prayers, relating to the application to the payment of the alleged debt of the defendant Eldridge to the plaintiff of that defendant's interest in the firm of Tucker, Anthony and Company, and of his interest in the alleged equitable assets in the hands of the other defendants.

The defendant Eldridge demurred to the bill, assigning causes of demurrer as follows:

"1. The facts alleged in the plaintiff's bill do not entitle the plaintiff to any relief in equity against this defendant.

"2. It does not appear from the bill that all the creditors of the Peoria Belt Railway Company are parties to this proceeding.

"3. It does not appear from the plaintiff's bill that this proceeding is brought by one creditor of the Peoria Belt Railway Company for the common benefit of all its creditors.

"4. That the Peoria Belt Railway Company is not a party to this proceeding.

"5. It does not appear that all the shareholders of the Peoria Belt Railway Company are parties to this action.

"6. It does not appear that all the shareholders of the Peoria Belt Railway Company, whose shares are not fully paid, are parties to this action.

"7. It appears from the bill that one of the issues presented for determination is whether the shares of stock alleged to belong to the defendant have been fully paid, which issue involves the administration of the internal affairs of a foreign corporation and questions of its relations to its shareholders, of which this court does not take jurisdiction.

"8. That the bill fails to set forth facts sufficient to give this court jurisdiction of the controversy.

"9. That it does not appear from the bill that any judgment has been recovered by the plaintiff against the Peoria Belt Railway Company."

The case was argued on the demurrer before *Hammond*, J..

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who made an order that the demurrer be overruled, from which the defendant Eldridge appealed. The justice reported the case as follows:

"It is manifest that the trial of the issues of fact may be protracted and expensive, and may be avoided should the demurrer be finally sustained.

"It appearing to be a matter which ought, before further proceedings, to be determined by the full court if either party so requests, I now, at the request of the defendant, report the cause upon the demurrer to the bill for the consideration and determination of the full court; such orders or decrees to be entered as justice and equity may require."

T. Hunt, for the defendant Eldridge.

J. B. Studley, for the plaintiff.

BRALEY, J. The defendants have demurred, and the question is, whether the bill, the allegations of which are admitted, states a case. It is alleged, that, by the laws of Illinois providing for the incorporation of associations "organized for the purpose of constructing railways, maintaining and operating the same, . . . Each stockholder of any corporation formed under the provisions of this act, shall be held individually liable to the creditors of such corporation to an amount not exceeding the amount unpaid on the stock held by him, for any and all debts and liabilities of such corporation, until the whole amount of the capital stock of such corporation so held by him shall have been paid." The defendant became a stockholder in a corporation organized under this act, and the nature and measure of his liability to corporate creditors is to be defined and determined by the language of the statute. It must affirmatively appear in a suit to enforce the statute that the corporation is indebted to the plaintiff, and that the defendant stockholder, while the holder, has failed either partially or wholly to pay into the treasury of the corporation the capital represented by the shares issued to him at its organization. *Kelly* v. *Killian*, 133 Ill. App. 102, 107. These essential requirements are complied with by the allegations of the existence of an unsatisfied indebtedness of the corporation to the plaintiff for instalments of accrued rent, and that, with the exception of six shares, the entire capital stock consisting of one thousand shares of the par value of

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$100 each, for which he has not paid, were issued to the defendant and have been continuously held by him.

But the defendant contends that, before he can be made responsible, judgment for the debt must be obtained against the corporation. The liability imposed is contractual. *Putnam* v. *Misochi*, 189 Mass. 421, 423. *Converse* v. *Ayer*, 197 Mass. 443, 453, and cases cited. *Converse* v. *Nichols*, 202 Mass. 270, 274. *Bernheimer* v. *Converse*, 206 U. S. 516. The corporation came into existence by virtue of the statute, and its stockholders were charged with notice of the provisions of the act, which was equivalent to a charter of incorporation. In voluntarily joining as an original stockholder, the defendant must be presumed to have known, that if he did not pay for his shares, creditors could compel him to pay to them the money he justly should have contributed to its capital for the stock he had received, and which would have enhanced its assets. *Converse* v. *Ayer*, 197 Mass. 443. The justice and expediency of the statute are not before us. Its evident purpose is to give a direct remedy to the creditor to obtain payment for his debt out of the unpaid capital, and in no event can the defendant be made to pay more than he owes. *Fleischer* v. *Rentchler*, 17 Ill. App. 402. *Hatch* v. *Dana*, 101 U. S. 205. If this liability had been made enforceable through the corporation, a judgment against it would have been indispensable before the stockholder could be reached. *E. Remington & Sons* v. *Samana Bay Co.* 140 Mass. 494, 496. *Train* v. *Marshall Paper Co.* 180 Mass. 513. By the statute, however, a judgment not having been required, none is necessary. The defendant's liability instead of having been made secondary, as provided in the foreign statutes involved and construed in *Hancock National Bank* v. *Ellis*, 166 Mass. 414, *Broadway National Bank* v. *Baker*, 176 Mass. 294, and *Bearse* v. *Mabie*, 198 Mass. 451, is expressly declared to be unconditional under the law of the place of contract, which must control. *Electric Welding Co.* v. *Prince*, 195 Mass. 242. *Hager* v. *Cleveland*, 36 Md. 476. *Gebhard* v. *Eastman & Gibson*, 7 Minn. 56. *Trippe* v. *Huncheon*, 82 Ind. 307. *Morrow* v. *Superior Court*, 64 Cal. 383. *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397.

The suit for the creditor's benefit furthermore is not made

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dependent upon either the joinder of other delinquent stockholders or of the corporation, or the appointment of a receiver to wind up the affairs and distribute the assets, and, if contribution from his co-stockholders and the remedy over against the corporation are deemed by him valuable rights, the defendant can establish and enforce them by appropriate proceedings. *Cary* v. *Holmes*, 16 Gray, 127. *Putnam* v. *Misochi*, 189 Mass. 421. *Montgomery Door & Sash Co.* v. *Atlantic Lumber Co.* 206 Mass. 144, 157. *Allen* v. *Fairbanks*, 45 Fed. Rep. 445.

If an exclusive remedy for the enforcement of the liability had been provided by the statute, it would have to be followed, and might not have been adapted to our remedial law. But if the remedy is not prescribed, the statutory personal liability of a stockholder according to our recent decisions may be enforced by any appropriate legal procedure of the State of his domicil. *Hancock National Bank* v. *Ellis*, 172 Mass. 39. *Putnam* v. *Misochi*, 189 Mass. 421, 423. *Converse* v. *Ayer*, 197 Mass. 443, and cases cited. See also *Perkins* v. *Church*, 31 Barb. 84; *Aldrich* v. *Anchor Coal Co.* 24 Ore. 32; *Hatch* v. *Dana*, 101 U. S. 205; *Flash* v. *Conn*, 109 U. S. 371; *Whitman* v. *Oxford National Bank*, 176 U. S. 559. The adjustment of equities, if any, between the corporation and its stockholders, or between the stockholders themselves, not being a preliminary requirement, the plaintiff could have sued in an action of contract, but as the bill seeks to reach and apply property of the defendant which cannot be seized on execution, it can be maintained for the establishment of the debt, and for equitable relief. *Hancock National Bank* v. *Ellis*, 172 Mass. 39. *Broadway National Bank* v. *Baker*, 176 Mass. 294. *Flash* v. *Conn*, 109 U. S. 371. R. L. c. 159, § 3, cl. 7.

A majority of the court is of opinion that the decree overruling the demurrer should be affirmed.

Ordered accordingly.

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KATHARINE HOOKER *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. March 24, 27, 1911. — September 6, 1911.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Carrier, Of passengers: liability for loss of personal baggage. *Interstate Commerce Act*. *Damages*, Limitation of liability. *Contract*, What constitutes.

The interstate commerce act does not change the common law rule prevailing in this Commonwealth, that a passenger on a railroad is not bound by a limitation of liability of the corporation operating the railroad as to the amount in value of personal baggage which will be carried upon a passenger ticket without extra charge and for which the corporation will be liable in case of loss, unless the passenger agreed to such limitation by express contract or by assent to a known regulation.

It here was assumed that the subject matter of passengers' baggage in interstate travel is within the control of Congress.

The fact, that a railroad corporation has inserted in its schedules of rates, fares and charges, filed and published under the orders of the interstate commerce commission, a statement that "baggage liability is limited to personal baggage not to exceed $100 in value for a passenger presenting a full ticket . . . unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of taking the baggage," does not make such limitation of liability a part of the established rate filed with the commission and thus binding on passengers whether they knew of it or not.

TORT by a passenger on a train of the defendant from Boston to Sunapee Lake Station in the State of New Hampshire on September 15, 1908, for loss of personal baggage, amounting to about $2,000 in value, checked for transportation on said train and destroyed by fire at said station while in the hands of the defendant as a common carrier. Writ dated October 13, 1908.

The answer, as amended, set up the defense of limitation of liability which is stated in the opinion. In the Superior Court the case was tried before *Harris*, J., without a jury. The facts material to the questions raised are stated in the opinion.

The judge made the following findings of fact requested by the plaintiff:

"That the loss of the plaintiff's baggage was due to the defendant's negligence;

"That the defendant failed to prove that the plaintiff or any one acting for her had actual notice, until after the destruction

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of her baggage, of the defendant's regulations limiting its liability;

"That any reasonable person would infer from the outward appearance of the plaintiff's baggage, when tendered to the defendant for transportation, that the value largely exceeded $100;

"That there was no evidence that any more expensive or different mode of transportation was adopted for baggage, the value of which had been declared to exceed $100, than for other baggage;

"That no inquiry was made by the defendant on receiving the plaintiff's baggage as to its value."

At the request of the defendant the judge found the facts in regard to the matters of defense which are stated in the opinion. The defendant, among other requests, asked for the following rulings:

"2. That the plaintiff cannot recover for the value of baggage exceeding $100 in value."

"8. That under the act of congress to regulate interstate commerce and the amendments thereof and the orders and regulations of the interstate commerce commission and the schedules of rates, fares and charges of transportation printed, published and filed by the defendant, the maximum limit of liability in this action is $100."

The judge found for the plaintiff in the sum of $2,133.04; and the defendant alleged exceptions.

F. N. Wier, (*L. T. Trull* with him,) for the defendant.

S. Williston, for the plaintiff.

RUGG, J. The plaintiff, an interstate passenger of the defendant, claims damages in excess of $2,000 for loss of her baggage occurring through the negligence of the defendant. The defense is that the liability of the defendant is limited to $100. The grounds upon which that defense is predicated are these: The defendant had complied with all the provisions of the statutes of the United States known as the interstate commerce act and the orders of the interstate commerce commission, and among other matters had filed and published schedules of rates, fares and charges, including those in force respecting the stations between which the plaintiff was a traveller. A part of the schedules relating to transportation of baggage was: "Regular Baggage

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Service One Hundred Fifty Pounds of Personal Baggage not exceeding one hundred dollars in value, will be checked free for each passenger on presentation of a full ticket, and seventy-five pounds for a half ticket. . . . For Excess Value, the rate will be one-half of the current excess baggage rate per one hundred pounds for each one hundred dollars, or fraction thereof, of increased value declared. The minimum charge for excess value will be 15 cents. Baggage liability is limited to personal baggage not to exceed one hundred dollars in value for a passenger presenting a full ticket and fifty dollars in value for a half ticket, unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of taking the baggage." These provisions were filed with the interstate commerce commission and with the agent of the defendant at Boston, where the plaintiff's baggage was checked, and a notice to this effect was conspicuously posted near the defendant's Boston ticket office, and a further notice of limitation of value of baggage was likewise posted in its Boston baggage room. The plaintiff did not, in fact, know of this regulation, nor of any rule limiting the value of baggage to be carried without extra charge. She was not asked for the value of her baggage at the time of checking it or of purchasing her ticket.

The common law rule fixing the rights of the parties is not open to doubt. It is that respecting the transportation of baggage or merchandise a common carrier may relieve itself from many of the heavy responsibilities amounting to insurance cast upon it by the law. It may not exonerate itself, however, by regulation or by contract from liability for its own negligence, but it may make just and reasonable stipulations in good faith as to the value of the property entrusted to its care, and the amount for which it shall respond in case of loss, even though occurring through its own negligence; such stipulations must be brought home to the knowledge of the shipper through either a formal contract, or express or inferable notice, under circumstances warranting the assumption of actual assent. *Brown* v. *Eastern Railroad*, 11 Cush. 97. *Malone* v. *Boston & Worcester Railroad*, 12 Gray, 388. *Cox* v. *Central Vermont Railway*, 170 Mass. 129, 136. *Graves* v. *Adams Express Co.* 176 Mass. 280. *John Hood Co.* v. *American Pneumatic Service Co.* 191 Mass. 27.

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Brown v. *Cunard Steamship Co.* 147 Mass. 58. *Hill* v. *Boston, Hoosac Tunnel, & Western Railroad*, 144 Mass. 284. *Graves* v. *Lake Shore & Michigan Southern Railroad*, 137 Mass. 33. *Bernard* v. *Adams Express Co.* 205 Mass. 254. *McKahan* v. *American Express Co.*, *ante*, 270. *Gardiner* v. *New York Central & Hudson River Railroad*, 201 N. Y. 387. *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331. *The Majestic*, 166 U. S. 375. *Cau* v. *Texas & Pacific Railway*, 194 U. S. 427. *Arthur* v. *Texas & Pacific Railway*, 204 U. S. 505. *New York Central & Hudson River Railroad* v. *Fraloff*, 100 U. S. 24, 27. See *In the Matter of Released Rates*, 13 Interst. Com. Rep. 550, and *Herbeck-Demer Co.* v. *Baltimore & Ohio Railroad*, 17 Interst. Com. Rep. 88. See cases collected in 4 Elliott on Railroads, (2d ed.) § 1510. This rule prevails commonly in the States of the Union, except in Pennsylvania, (*Hughes* v. *Pennsylvania Railroad*, 202 Penn. St. 222,) Iowa, Kansas, Texas and Kentucky. See 1 Hutch. on Carriers, (3d ed.) § 405, and cases cited.

It is recognized generally that a public notice restricting in any respect the common law liability of the carrier is not binding upon the shipper or passenger, even though known, unless assented to by him. Ordinarily, such assent is not implied merely from knowledge, though this may be a significant circumstance, in the light of the requirements of good faith, in connection with others in warranting the inference of assent. *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 6 How. 344, 382. *Railroad Co.* v. *Manufacturing Co.* 16 Wall. 318, 329. *Judson* v. *Western Railroad*, 6 Allen, 486. *Buckland* v. *Adams Express Co.* 97 Mass. 124. *Faulk* v. *Columbia, Newberry & Laurens Railroad*, 82 S. C. 369. See cases collected in 4 Elliott on Railroads, (2d ed.) § 1501, and note.

The English rule is slightly more favorable to the carrier, and affirms the binding force of a notice of limitation, if the carrier has done all that is reasonably sufficient to give to the shipper knowledge of the limitation. *Henderson* v. *Stevenson*, L. R. 2 H. L. (Sc.) 470. *Richardson, Spence & Co.* v. *Rowntree*, [1894] A. C. 217.

It is plain that if the plaintiff's case rested at common law, the action of the Superior Court would stand, for the fact is expressly found that the plaintiff had no knowledge of the reg-

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ulation limiting the value of baggage gratuitously carried by the defendant as a part of the transportation for each passenger.

It is earnestly argued by the defendant that the common law rule is abrogated as to this case, which involves a transportation between two States, by the federal interstate commerce act. U. S. St. February 4, 1887, c. 104; 24 U. S. Sts. at Large, 379. U. S. St. March 2, 1889, c. 382; 25 U. S. Sts. at Large, 855. U. S. St. February 10, 1891, c. 128; 26 U. S. Sts. at Large, 743. U. S. St. February 8, 1895, c. 61; 28 U. S. Sts. at Large, 643. U. S. St. February 19, 1903, c. 708; 32 U. S. Sts. at Large, 847. U. S. St. June 29, 1906, c. 3591; 34 U. S. Sts. at Large, 584.

It may be conceded that the subject matter of passengers' baggage in interstate travel is within the control of Congress, and any enactment by it would bind the parties. It is not contended that there is any specific regulation respecting it to be found in any act of Congress. The precise position of the defendant is that as the limitation of liability for baggage was filed and posted as a part of its schedules for passenger tariff, the limitation thereby became and was an essential part of its rate, from which under the interstate commerce law it could not deviate, and by which the plaintiff was bound, regardless of her knowledge of or assent to it. If the premise is sound, then the conclusion follows, for the public are held inexorably to the rate published, regardless of knowledge, assent or even misrepresentation. *Gulf, Colorado & Santa Fe Railway* v. *Hefley*, 158 U. S. 98. *Texas & Pacific Railway* v. *Mugg*, 202 U. S. 242. *Melody* v. *Great Northern Railway*, 25 So. Dak. 606.

The aim of the interstate commerce act has been stated to be to secure for all the public reasonable rates and equality of rates without discrimination or preference, and that subject to these two dominating purposes the carriers and the people are left to their common law freedom of making special contracts according to their interests and necessities. *Cincinnati, New Orleans & Texas Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 184, 196, 197. *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway*, 167 U. S. 479, 493. *New York, New Haven & Hartford Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361, 391. *Interstate Com-*

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merce Commission v *Delaware, Lackawanna & Western Railroad*, 220 U. S. 235, 253.

Several expressions are to be found in decisions of the United States Supreme Court, which by themselves alone might be taken to indicate that whatever is posted and filed as required by the law thereby is called to the attention of the public, and binds everybody. See for example *Louisville & Nashville Railroad* v. *Mottley*, 219 U. S. 467, 476. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81. *Texas & Pacific Railway* v. *Cisco Oil Co.* 204 U. S. 449, 451. *Gulf, Colorado & Santa Fe Railway* v. *Hefley*, 158 U. S. 98, 101. But, without examining them in detail, it is apparent from the context that these phrases were intended only to emphasize the general proposition that under the interstate commerce act full publicity of the rates established by the carriers is required, and ample facility given to every interested member of the public to ascertain precisely what those rates are, and that these rates so established under the law are binding upon everybody, and cannot be modified or departed from. Their reasonableness cannot be tried out in an ordinary action in courts between shipper and carrier, but only by petition to the interstate commerce commission. *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.* 204 U. S. 426. *Baltimore & Ohio Railroad* v. *United States*, 215 U. S. 481. The binding force of the limitation as to amount of recovery in case of loss must stand, if it can stand at all, as being a part of the established rate when filed with the commission and with its officers, and thus binding upon all the travelling public without knowledge of their contents, and not upon the proposition that by being posted "in two public and conspicuous places in every depot" the public were constructively notified thereof. This follows from the decision in *Texas & Pacific Railway* v. *Cisco Oil Co.* 204 U. S. 449, 451, to the effect that such posting is not a condition precedent to the taking effect of the schedule, but that the rate becomes operative upon filing with the interstate commerce commission and furnishing copies to its officers, even though not publicly posted. It is to be noted also that this is not a case where the interstate commerce commission has established a limitation of value of baggage to be carried free as a part of a rate.

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The pivotal question then is whether the limitation as to liability for loss of baggage transported without extra charge is a part of the passenger rate or tariff, or whether it is a subsidiary incident to the main matter of fare. We are of opinion that it is not an essential element in the fare for transportation of passengers. Limitation of liability by contract in case of loss has not been abolished by the interstate commerce act. Reasonable agreements in this regard are upheld. This is a subject, about which the policy established in the several States prevails, since as well as before the enactment of the federal statutes. Hence an agreement inserted in a bill of lading limiting liability in case of loss has been held invalid if contrary to the law of a State, even though made the basis of a contract of interstate carriage. In *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477, a horse was shipped from Albany in the State of New York to Cynwyd, in the State of Pennsylvania, and was injured by a connecting carrier in the latter State. The bill of lading stated that the freight was to be paid at the lower published rate "upon the express condition that the carrier assumes liability . . . to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation . . . and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event." The valuation stated was not exceeding $100. Under the law of Pennsylvania, such a limitation was invalid, and a verdict for the owner for $10,000 was sustained in the State court. Upon error to the State court the point was clearly raised that this agreement in the bill of lading was within the protection of the federal interstate commerce clause and act. But it was said by the court, through Mr. Justice Day, after summarizing the requirements of the interstate commerce act, at p. 488, "We look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?" After a review of the cases, it is said further, at p. 491: "The principle recognized is that in the absence of

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congressional legislation upon the subject, a State may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties. We can see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts. The State has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding." To the same point are *Chicago, Milwaukee & St. Paul Railway* v. *Solan*, 169 U. S. 133, *Martin* v. *Pittsburg & Lake Erie Railroad*, 203 U. S. 284, and *Latta* v. *Chicago, St. Paul, Minneapolis & Omaha Railway*, 97 C. C. A. 198, 202. It is true that in none of these cases, so far as appears in the reports, was the limitation of liability inserted in the schedules as filed and posted under the interstate commerce act, but that appears to us to be an immaterial circumstance. The rate was stated in the several contracts of carriage to be based on the value given. It would be hard to conceive of a rate more plainly bound up with the limitation. It is the substance of the matter and not the form which is decisive. A rate established by a carrier and stated in its schedule as filed to be dependent upon certain limitations of liability, can have no higher or different character than a like rate conditioned by a contract upon the same limitation of liability. The carrier cannot make something a rate merely by calling it by that name. It cannot convert that, which is in its essence a subject for regulation according to the law or policy of the several States, into the rigidity of a rate protected by the federal laws, simply by putting it into a schedule which is called a schedule of rates and tariffs. The defendant seeks the protection of a federal statute. The decisions of the United States Supreme Court are of controlling authority in this respect. The cases we have cited seem to decide, in principle, that the limitation of liability invoked by the defendant is not one which is under the ægis of the interstate com-

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merce act. The subject is one which is not so related to rates of transportation of passengers as to be a part of such a rate. It is governed by the law of the State where the contract of carriage is made and enforced. While this point has not been discussed to any extent, many decisions seem to be based upon the principle we have stated. See *Fielder & Turley* v. *Adams Express Co.* 69 W. Va. 138; *Miller* v. *Chicago, Burlington & Quincy Railroad*, 85 Neb. 458; *Windmiller* v. *Northern Pacific Railway*, 52 Wash. 613; *Louisville & Nashville Railroad* v. *Venable*, 132 Ga. 501; *Hasbrouck* v. *New York Central & Hudson River Railroad*, 202 N. Y. 363.

As we have pointed out, there is no doubt that by the common law of this Commonwealth the plaintiff was not bound by the limitation of liability of which she was wholly ignorant. She could have been restricted in right of recovery only by express contract or by assent to a known regulation.

The only other exception not expressly waived by the defendant has become immaterial in view of the ground upon which this judgment rests.

Exceptions overruled.

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SUPPLEMENT.

Opinion of the Justices to the Senate.

A statute, providing that, in an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense that the employee was negligent, if not guilty of serious and wilful misconduct, or that the injury was caused by the negligence of a fellow employee, not guilty of serious and wilful misconduct, or that the employee had assumed the risk of such an injury, with an express provision that the act shall not apply to injuries sustained before it takes effect, violates no rights secured by the Constitution of this Commonwealth or by the Constitution of the United States.

In a statute providing that, in an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense that the employee was negligent or that the injury was caused by the negligence of a fellow employee or that the employee had assumed the risk of such an injury, there is nothing unconstitutional in a provision that the provisions already mentioned shall not apply to domestic servants and farm laborers.

In a statute providing a system of compensation for personal injuries received by employees in the course of their employment there is nothing unconstitutional in a provision that an employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer notice in writing that he claimed such right.

A statute, which provides through the instrumentality of a corporation established by the act and the subscription of employers thereto a system of compensation to employees for personal injuries received by them in the course of their employment and not due to serious and wilful misconduct on their part, and which contains nothing compelling an employer to become a subscriber or compelling an employee to waive his right of action at common law and accept the compensation provided for him in the act, is not in violation of the Constitution of this Commonwealth or of the Fourteenth Amendment of the Constitution of the United States.

In a statute providing a system of compensation for personal injuries received by employees in the course of their employment it is within the power of the Legislature to provide that no agreement by an employee to waive his rights to compensation under the act shall be valid.

In a statute, which provides through the instrumentality of a corporation created by the act and the subscription of employers thereto a system of compensation to employees for personal injuries received by them in the course of their employment and not due to serious and wilful misconduct on their part, there is nothing unconstitutional in an additional provision that any liability insurance

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company authorized to do business in this Commonwealth shall have the same right as the corporation created by the act to insure the liability to pay the compensation provided for in the act, that a policy holder of such liability company shall be regarded as a subscriber so far as applicable within the meaning of the act, and that when any such company insures such payment of compensation it shall be subject to all the regulations and obligations imposed upon the corporation created by the act.

On July 18 and 19, 1911, the following orders were passed by the Senate and on the last named day were transmitted to the Justices of the Supreme Judicial Court. On July 24, 1911, the Justices returned the answer which is subjoined.

Senate, July 18, 1911.

Whereas, There is now before the Senate a bill entitled "An Act relative to payments to employees for personal injuries received in the course of their employment and to the prevention of such injuries," being House Document No. 2154; and

Whereas, No similar legislation has ever been enacted in this Commonwealth; and

Whereas, An act for a similar purpose was enacted in the State of New York, and has been decided to be in violation of the Constitution of the State of New York and of the Fourteenth Amendment to the Constitution of the United States; and

Whereas, There appears to be no precedent bearing on said subject in other jurisdictions in the United States;

Be it Ordered, That the opinion of the Justices of the Supreme Judicial Court be required on the following important questions of law:

First. Is the said bill, House Document No. 2154, in conformity with the provisions of the Constitution of the Commonwealth of Massachusetts which requires that property shall not be taken from a citizen without due process of law?

Second. Is the bill in conformity with the fourteenth amendment to the Federal Constitution?

Senate, July 19, 1911.

Ordered, That in submitting to the Justices of the Supreme Judicial Court a copy of the order adopted by the Senate requiring the opinion of the said Justices as to the constitution-

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ality of the House Bill relative to payments to employees for personal injuries received in the course of their employment and to the prevention of such injuries, the clerk be directed to forward to the Justices a copy of the amendment of the said bill adopted by the Senate; and that, in rendering their opinion, the Justices be directed also to take into account the effect of the said amendment on the bill.

The amendment adopted by the Senate was the insertion in Part V. after § 2 of the following new section:

"Section 3. Any liability insurance company authorized to do business within this Commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by this act, and a policy holder of such liability company shall be regarded as a subscriber so far as applicable within the meaning of this act, and when any such company insures such payment of compensation it shall be subject to all the regulations and obligations imposed upon the association."

[House bill No. 2154, as amended by the insertion of the section printed above was enacted, practically without change, in St. 1911, c. 751, which was approved on July 28, 1911.]

To the Honorable Senate of the Commonwealth of Massachusetts:

We have received the questions, of which a copy, with the act referred to therein and the amendment adopted by the Senate, is hereto annexed, and after giving to them such consideration as we have been able to give in the time at our disposal, we respectfully answer them as follows:

The questions submitted to us are important, and the proposed act involves a radical departure in the manner of dealing with actions or claims for damages for personal injuries received by employees in the course of their employment from that which has heretofore prevailed in this Commonwealth; but we think that nothing would be gained by an extended discussion and we therefore content ourselves with stating briefly the conclusions to which we have come and our reasons therefor.

The first section of the act (Part I. § 1) provides that "In an action to recover damages for personal injury sustained by an

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employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury."

This section deals with actions at common law. We construe clauses 1 and 2 in their reference to negligence as meaning contributory negligence or negligence on the part of a fellow servant which falls short of the serious and wilful misconduct which under Part II. § 2, will deprive an employee of the right to compensation. So construed we think that the section is constitutional. We neither express nor intimate any opinion whether it would be unconstitutional if otherwise construed. The rules of law relating to contributory negligence and assumption of the risk and the effect of negligence by a fellow servant were established by the courts, not by the Constitution, and the Legislature may change them or do away with them altogether as defenses (as it has to some extent in the employers' liability act) as in its wisdom in the exercise of powers entrusted to it by the Constitution it deems will be best for the "good and welfare of this Commonwealth." Const. Mass. c. 1, § 1, art. 4. See *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593. The act expressly provides that it shall not apply to injuries sustained before it takes effect. If, therefore, a right of action which has accrued under existing laws for personal injuries constitutes a vested right or interest, there is nothing in the section which interferes with such right or interest. The effect of the section is not to authorize the taking of property without due process of law, as the Court of Appeals of New York held was the case with the statute referred to in the preamble to the questions submitted to us and which in consequence thereof was declared by that court to be unconstitutional. *Ives* v. *South Buffalo Railroad*, 201 N. Y. 271. Construing the section as we do and as we think it should be construed, it seems to us that there is nothing in it which violates any rights secured by the State or Federal Constitutions. We see nothing unconstitutional in providing, as is done in Part I. § 2, that the provisions of § 1 shall not apply to domestic servants

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and farm laborers; nor in providing, as is done in Part I. § 5, that the employee shall be deemed to have waived his right of action at common law if he shall not have given notice to his employer as therein provided. The effect of the provisions referred to is to leave it at the employee's option whether he will or will not waive his right of action at common law. See *Foster* v. *Morse*, 132 Mass. 354.

The rest of the act deals mainly with a scheme for providing, through the instrumentality of a corporation established for that purpose entitled the Massachusetts Employees Insurance Association, and the subscription of employers thereto, for compensation to employees for personal injuries received by them in the course of their employment, and not due to serious and wilful misconduct on their part. There is nothing in the act which compels an employer to become a subscriber to the association, or which compels an employee to waive his right of action at common law and accept the compensation provided for in the act. In this respect the act differs wholly so far as the employer is concerned from the New York statute above referred to. By subscribing to the association an employer voluntarily agrees to be bound by the provisions of the act. The same is true of an employee who does not choose to stand upon his common law rights. An employer who does not subscribe to the association will no longer have the right in an action by his employee against him at common law to set up the defense of contributory negligence or assumption of the risk, or to show that the injury was caused by the negligence of a fellow servant. In the case of an employee who does not accept the compensation provided for by the act and whose employer has become a subscriber to the association, an action no longer can be maintained for death under the employers' liability act. But these considerations do not constitute legal compulsion or a deprivation of fundamental rights. We do not deem it necessary to take up and consider in detail the numerous provisions by which the right to compensation and the amount thereof and the persons entitled thereto and the course of procedure to be followed and matters relating thereto are to be settled and determined. We assume, however, that the meaning of §§ 4 and 7 of Part III. of the proposed act is that the approved agreement or decision therein mentioned is to

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be enforced by proper proceedings in court, and not by process to be issued by the Industrial Accident Board itself. Taking into account the non-compulsory character of the proposed act, we see nothing in any of these provisions which is not "in conformity with" the Fourteenth Amendment of the Federal Constitution, or which infringes upon any provision of our own Constitution in regard to the taking of property "without due process of law." It is within the power of the Legislature to provide that no agreement by an employee to waive his rights to compensation under the act shall be valid. See *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593.

In regard to the amendment it is to be observed that no liability insurance company is obliged to insure, and that if it chooses to do so there is nothing unconstitutional in requiring that it and the policy holder shall be governed by the provisions of the act so far as applicable.

It should be noted perhaps in the interests of accuracy that there is no phrase in our Constitution which in terms requires that "property shall not be taken from a citizen without due process of law." The quoted words, which we take from the first question submitted to us, are a paraphrase of what is contained in the Constitution, but are not the language of the Constitution itself.

We have confined ourselves to the questions submitted to us, and we answer both of them in the affirmative.

Owing to their absence from the Commonwealth, the Chief Justice and Mr. Justice Loring have taken no part in the consideration of the questions.

JAMES M. MORTON.
JOHN W. HAMMOND.
HENRY K. BRALEY.
HENRY N. SHELDON.
ARTHUR PRENTICE RUGG.

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THE HONORABLE JOHN LATHROP, a Justice of this court from the twenty-eighth day of January, 1891, until the eleventh day of September, 1906, died at Dedham on the twenty-fourth day of August, 1910. A meeting of the members of the bar of the Commonwealth was held in Boston on the twenty-first day of October, 1911, at which a memorial was adopted, which was presented to the full court on the same day. Before presenting it, the Attorney General addressed the court as follows:

May it please your Honors: We are assembled this morning for the purpose of paying deserved and fitting tribute to the name and memory of the late Mr. Justice John Lathrop, formerly an honored member of the Supreme Judicial Court, who died on the twenty-fourth day of August, 1910. In accordance with long-established custom, the Attorney General has been called upon to present to this honorable court formal resolutions adopted by the members of the bar, expressing their appreciation of and regard for the public services and judicial career of the late Justice Lathrop and their esteem for him as an honorable citizen of the Commonwealth.

In assuming the duty and privilege assigned to me by my learned brethren of the bar, I regret that I am unable from personal acquaintance or official experience with Justice Lathrop to supplement these resolutions with recollection of personal association. While I appeared before him in numerous cases in general practice, it never was my privilege to know him intimately or otherwise than in his judicial capacity. However, those things were apparent to me that were observable by other attorneys appearing before the court of which he was an important member for so long a time. He always displayed acute interest in each proposition that was submitted for his consideration. He quickly grasped the points that were made on either side. He did not hesitate to inquire of counsel concerning that of which he had any doubt. His query was always to the point. Counsel always felt that he had been fairly dealt with and fully heard.

Under our system of appointment to the bench for life, the

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history of our courts has been that the service of the justices has extended, ordinarily, over a long period of years, and that the Commonwealth has benefited in a large measure by the continued service and increased efficiency necessarily resulting therefrom. This proved to be the case with Mr. Justice Lathrop. His bent of mind, his early training and his progressive professional life seemed to point naturally to his final elevation to the Supreme Judicial Court. There he displayed the results of the early training that made his appointment to that court so natural and fitting.

Although, during the period of my acquaintance with him, he was in the sunset years of his life, and despite the failing health that eventually compelled him to cease his valuable labors on behalf of the judicial service of the Commonwealth, nevertheless, he appeared to be one of those men whose active mentality kept his face ever toward the morning light of the progress of the times, and whose present vision was not dimmed by the recollection of events belonging only to the past. His exact, logical and lucid opinions may well be considered a fitting and everlasting monument to his life work.

I now have the honor to move that the memorial be accepted and made a part of the records of the court.

The Attorney General then presented the following memorial:

The members of the bar desire to place on record their appreciation of the public services and judicial career of John Lathrop, late a Justice of the Supreme Judicial Court, who resigned from the bench because of continued ill health on September 11, 1906, and who died on August 24, 1910.

Born in Boston on February 8, 1835, he passed his early years in Dedham, in the County of Norfolk, and in Dedham, after an eventful life as a soldier and jurist, he died and was buried. Descended from a long line of clerical ancestors of purest English stock, his father continuing the line as a chaplain in the Navy, his early life was subject to the vicissitudes of a clergyman's career.

He was graduated from Burlington College in the State of New Jersey in 1853; he studied law in the Harvard Law School, whence he was graduated in 1855; and he was admitted to the

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Suffolk bar in 1856. In 1906, toward the end of his creditable career upon the bench, Williams College honored itself and recognized his meritorious service in more than one walk in life by bestowing upon him the honorary degree of Doctor of Laws.

He was scarcely enrolled as an attorney and counsellor upon his admission to the bar, when, at the outbreak of the Civil War, the call of duty led him unhesitatingly to give up a promising practice to enter the Volunteer Army. He enlisted in the Dedham Company which became a part of the 35th Regiment of Massachusetts Volunteers, and was commissioned as a first lieutenant. Thrown at once into active service he developed quickly the qualities of a resourceful soldier and officer. He was brave, he was indefatigable, he was careful of his men, he had them well in hand. He was, besides, alert, punctilious, painstaking, methodical, qualities that distinguished him throughout his career. He fought at South Mountain, at Antietam, at Fredericksburg, with coolness, daring and good judgment; was promoted to a captaincy and was no mean factor in gaining for the 35th the title of a "fighting regiment." Unhappily in the autumn of 1863 Captain Lathrop contracted malarial fever, which compelled him on November 13 of that year to resign for disability; and thereupon he returned to Boston, broken in health, to resume the practice of the law.

During his subsequent career at the bar he had the reputation of being a conscientious practitioner and a competent adviser, while in the narrowing field of the law of admiralty, which he made his specialty, he came to be recognized as a leader.

The bent of his mind was toward the literary side of the law and this led him to accept the congenial appointment of Reporter of Decisions of the Supreme Judicial Court, to which he was appointed in March, 1874.

When he entered upon his new duties he found, owing to the ill health of his predecessor, the work of his important office largely in arrears and the bar clamoring for the delayed reports. With limited assistance and lacking modern devices for hastening such work, he addressed himself vigorously to the task of closing the gap and of overtaking the court. Cases enough to make several intermediate volumes were taken in hand by scholarly lawyers by whom they were prepared and published as volumes

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110 to 114 inclusive of the Massachusetts Reports. Meanwhile the new reporter addressed himself to the task of reporting the more recent decisions as promptly as the technical character of the work and the continuous and sporadic accumulation of cases in his hands would permit. One notable change in the method of grouping cases in each volume was made by him, which in itself resulted in a greater celerity in the issue of the reports. This was the abolition of a custom, which had obtained in this Commonwealth from the days of Quincy and Pickering, of grouping in each report all the cases argued at a certain law term and in a given county, the result of which was that the large number of cases which were promptly decided waited for publication upon the more or less delayed decision by the court of the last of the series. Under the new system the decisions for the first time were reported consecutively as they came down from the full bench according to the date of the rescript, which, together with the date of the argument, the county of origin and the names of the sitting justices, has since been printed under the title of each case.

Since this system was adopted by Judge Lathrop it may be confidently asserted that the reports have been placed in the hands of the profession with all reasonable promptitude considering the nature of the work, the equipment of the reporter's office, and the personal equations involved.

As a reporter Mr. Justice Lathrop was conventional and conservative, and he clung closely to the methods of his predecessors in that high professional calling, conforming religiously to the "canons of law reporting" as exemplified by the reports of the courts in England and in this country, both in this Commonwealth and in other courts of last resort, State and Federal. His marginal notes, according to the theory that such notes in each case should, instead of short statements of general principles involved, reproduce with photographic exactness the facts of the case followed by what was "held" thereon by the court, were always exact, though often long; the explanatory statements of facts as drawn by him made clear every basis of contention of counsel and responded completely to the opinion of the court; while the opinions of the justices on more than one occasion gained in expressive diction, in closeness of

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reasoning and in authoritative force through his frank criticism, his grasp of legal principles, and his wide and increasing familiarity with the adjudged cases. His English style was simple, crisp and forcible, and his reports as issued from the press were models of typographic excellence.

Thirty-one volumes of the Massachusetts Reports, numbered 115 to 145 inclusive, were the output of his office while he occupied the responsible position of reporter.

In March, 1888, while still Reporter of Decisions, he was appointed a Justice of the Superior Court. To perform adequately the duties incumbent upon a judge of the great trial court of the Commonwealth requires, besides sound learning and abundant common sense, a wealth of experience in the practice of the law, a knowledge of human nature, a faculty for administration and a sympathetic temperament, combined with firmness, good judgment and infinite patience, qualities rare to find blended in one and the same person. If Mr. Justice Lathrop lacked some of these qualities, he at least possessed enough of them to render during his brief tenure upon that bench effective service to litigants and to the Commonwealth, while at the same time he was preparing for a different but not more important service in the court of last resort. He was industrious and painstaking in applying the law to the facts of a case, fair to counsel, protective of witnesses, considerate toward juries, and solicitous of the rights of parties.

When appointed a Justice of the Supreme Judicial Court in 1891, he was placed in a position more in accord with his tastes and legal training. He disclosed as a member of the court of last resort the same qualities that marked him as reporter. He wrote opinions as a Reporter of Decisions might be expected to write them. He was wont to state the facts of a case lucidly and compactly, and then to lay down the law applicable to such facts according to the adjudged cases. He was above all a case lawyer, who in all his work hewed close to the line of legal authority as laid down in the reports. Until September, 1906, when he was compelled to resign from active work because of ill health, he labored unceasingly in doing thoroughly and promptly his share of the work of the important tribunal of which he was an honored member.

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He was ever a man of a self contained, dignified and impassive demeanor, who treated that portion of the public which came in contact with him with an even-handed justice, and with a reserved and somewhat formal courtesy. In the social and club life of Boston, in which he was always a considerable figure, he was considerate of the rights and feelings of others, and on occasion an interesting even charming companion. To a small circle of contemporary friends, of which he was nearly the sole survivor, did he alone reveal his real and kindly self, and to them he was united by ties the most friendly, even tender and affectionate.

Never in full or robust health, he strove through life to do every task laid upon him thoroughly and ungrudgingly, and, though at times a great sufferer, carried himself with unflinching fortitude and without complaint.

He was a brave and self-sacrificing soldier, a conservative and patriotic citizen, a careful and industrious lawyer, a diligent and high-minded judge, a most useful public servant.

CHIEF JUSTICE RUGG responded as follows:

Brethren of the Bar: It is altogether fitting, and in accordance with time honored usage, that the court pause in its regular business to join with the bar in a tribute of respect and appreciation to the memory of one of its Justices, who has deceased. Nothing which can be said or done on such an occasion will much affect the position of the one who has gone, in jurisprudence or in the history of the law of the Commonwealth. Any one who has been long upon this bench has written, in its opinions, his own record, where it is beyond the reach of praise or detraction. But there is a just satisfaction in a delineation by friends and associates of the salient facts of the life, the personal traits and marked characteristics of one who has rendered valuable public service.

John Lathrop, for many years and in different capacities, was active in living the full life of a devoted servant of the State. He was born in Boston on February 8, 1835, where he lived during most of his life, and died in Dedham on August 24, 1910, where his ashes lie buried. He inherited a name already rendered distinguished in the annals of the Commonwealth by more

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than one forebear. His first ancestor on this continent was Rev. John Lothrop, who came here in 1634, and became the first minister at both Scituate and Barnstable, while his great-grandfather, also of the same name, was minister of the Second Church in Boston for almost half a century.

Graduating at Burlington College, New Jersey, and at the Harvard Law School, he entered upon the practice of his profession in 1856 in Boston. His sense of patriotic duty impelled him to volunteer in the war for the preservation of the Union, where he rose to the rank of captain. After zealously performing this duty, he returned to the practice of the law, and continued the consideration of legal questions without interruption until the infirmities of age compelled his relinquishment of them in 1906. He gave special attention to practice in admiralty, and had attained some distinction in that branch of law, when in 1874 he was appointed Reporter of Decisions of this court. The headnotes of the cases in our reports, the work of his hand, during the fourteen years he held this office, from volume 115 to volume 145 inclusive, are plain, concise and accurate. His reputation for sound and comprehensive learning is attested by the fact that he was lecturer upon different branches for several years in the law schools of Harvard and Boston Universities.

The training gained in the careful performance of these important duties was helpful in his years of judicial work. He was a Justice of the Superior Court from 1888 until his appointment to this bench in 1891, where he served fifteen years. The first opinion of the court written by him is found in 153 Mass. 215, and the last in 192 Mass. 451. In these forty volumes are the visible evidences of his achievements upon this court. His memory of cases was remarkable in fulness and correctness, and was constantly exercised in performing his judicial duties. His decisions were firmly grounded upon precedents. The characteristics of his opinions were accuracy of citation and purity of style. In these respects they are among the best. They are clear in statement, and confined closely to the points actually in issue. He did not attempt to write an exhaustive exposition of the questions of law involved, and he thereby avoided indulging in dicta which not infrequently become troublesome to the bench as well as to the bar. His method of thought was direct and incisive,

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and his expression of it was in simple language. His opinions are easy of comprehension, and cannot well be misunderstood.

He loved the city of his home, and was fond of her history. Quiet and unobtrusive in his mode of life, he was scholarly in his tastes, and cherished a fondness for choice and rare books. His long experience as Reporter of Decisions and Justice in each of the higher courts gave him an intimate acquaintance with almost a generation of judges and an unusual familiarity with the judicial traditions of the Commonwealth. He was fond of friends, and in social organizations enjoyed the companionship of gentlemen of refinement and learning.

During a long and laborious life, he bore his part with courage, faithfulness, ability, learning, soundness of judgment and steadfast adherence to high ideals. He was modest and unpretentious in the incumbency of high office, but he was mindful of the responsibility and dignity which accompany the proper administration of justice.

An order may be entered that the memorial be recorded, and the court will now adjourn.

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INDEX.

ACCORD AND SATISFACTION.

1. The proposition, that the acceptance and collection of a check, proffered upon the condition that it is in full settlement of an unliquidated claim, even though accompanied by protestations that it is not so received, bars any attempt to collect the balance, is supported by the great weight of authority. Remark of RUGG, J. *Worcester Color Co.* v. *Henry Wood's Sons Co.* 105.

2. The use of the words "in full to date" or an equivalent phrase in connection with the payment of a controverted claim does not necessarily create an accord and satisfaction, and often, although these words have been used, it is a question of fact whether the acceptance of the payment constituted an accord and satisfaction. *Ibid.*

3. In an action for the price of certain goods the defendant admitted that the goods had been sold and delivered to him by the plaintiff but alleged that there had been an accord and satisfaction. It appeared that, about a week after the goods were sold and delivered, a contract in writing was made by the parties for the sale of other articles, and that later the payments called for by the contract in writing were made in full. The defendant, when asked to pay for the goods in question, asserted that they had been included in the contract in writing. This was denied by the plaintiff. In the month following the making of the contract in writing the plaintiff shipped to the defendant a consignment of pulp blue, which the defendant had ordered in a separate transaction. There was a dispute between the parties as to the quantity and the quality of the pulp blue and as to the price to be paid for it. After correspondence, the plaintiff sent to the defendant a corrected bill for the pulp blue, stating as the amount due a sum considerably less than that originally claimed. The defendant thereupon returned the corrected bill in a letter, saying, "Enclosed please find check for your account in full," naming the amount of the corrected bill for the pulp blue. Enclosed was a check for that amount on which was written "in full to date." The plaintiff, after consultation with his attorney, drew a pen through the words "in full to date," collected the check in ordinary course and sent the receipted bill to the defendant with a letter, in which he said that the check was in settlement of the invoice of the pulp blue and was not in full for all claims, and asked the defendant to remit the price of the goods now sued

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for. It was plain as matter of law that the contract in writing between the parties did not include the items in dispute as the defendant wrongly had supposed and asserted. *Held*, that the letter of the defendant, in which the check was transmitted, and the words written upon the check, in the light of all the transactions between the parties, were not so plain and unequivocal as to warrant a ruling of law that they meant an offer of the check upon the condition that, if accepted, it would be in full settlement of all disputed claims, that the burden of proving the defense of an accord and satisfaction was on the defendant, and that the question whether he had sustained that burden was one of fact for the jury. *Worcester Color Co.* v. *Henry Wood's Sons Co.* 105.

Action of contract involving question, whether there had been settlement of claim set out in declaration in set-off by payment or accord and satisfaction, see PAYMENT, 1; PRACTICE, CIVIL, 15.

ACCOUNTING.

Suits in equity for accounting, see TRUST, 3, 5–8, 11, 12; EQUITY JURISDICTION, 15, 16, 29; EQUITY PLEADING AND PRACTICE, 6, 7; FRAUDS, STATUTE OF, 2.

ACTION, SURVIVAL OF.

See SURVIVAL OF ACTION.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE USE.

Regarding right of way acquired by adverse use, see WAY, 2–8.

AGENCY.

Existence of Relation.

1. At the trial of an action against the owner of an automobile for injuries caused by its collision with another automobile in which the plaintiff was driving, it appeared that the defendant's automobile was being driven by the defendant's son, nineteen years of age. The defendant contended that at the time of the accident his son was not operating the automobile as his servant but on the son's own account. The weight of the testimony was that the son was using the automobile with his father's permission solely for his own purposes. There was evidence, however, that the son was employed regularly by his father as chauffeur, that he lived in his father's family, that persons whom he brought in the automobile to a dance on the evening of the accident and carried home again just before the accident, were in the presence of his father and his father's family at the dance, and that his father saw him start to take them home from the dance, and told him that he had better light his headlights. *Held*, that

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there was evidence for the jury on the question whether the son was representing his father in operating the automobile at the time of the accident. *Bourne* v. *Whitman*, 155.

2. At the trial of an action by the assignee of a corporation, engaged in the sale and lease of milking machines and the sale of dairy supplies, against one who had been its "division manager" for a certain territory, to recover upon an account annexed for certain supplies alleged to have been furnished to the defendant by the corporation, it appeared that the items in the account annexed were correctly stated. The defendant introduced evidence tending to show that he was elected "division manager" by the directors of the corporation in November of a certain year, at a meeting when a majority of the directors were present, and that it also then was voted that his "commission" be twenty per cent "of installation fees and rentals of" milking machines "installed in his territory," that the corporation had its depot of supplies in Holyoke, that immediately after the directors' meeting the defendant had a talk with them and asked that they send him supplies at his place of business, to which the president replied that they did not have money enough to run two stations of supplies and that if he had them he would have to advance money toward them; that thereafter and until the time of the severance of his relations with the corporation two years later the defendant acted for the corporation in the selling and leasing of milking machines and kept supplies at his place of business, both supplies and machines being shipped to him on his order and invoiced to him at a gross price less his commission; that the defendant made collections and remitted to the corporation, but at no stated times; that in April of the second year of his service as "division manager," the directors of the corporation discontinued that office and notified him thereof; that during April a statement was made by the defendant and his agent of all transactions between the corporation and himself to that date, and the amount shown thereby to be due to the corporation from him was paid by him, the amount being accepted by the corporation in full satisfaction of all items previous to the time when the defendant ceased to be division manager with exceptions not material; that thereafter the corporation made to the defendant a proposition that he deal with it as a "dealer" subject to certain conditions, and that milkers and supplies be furnished to him at certain stated "discounts" from the list prices, and until the following July efforts were made to reach a mutual working basis, which proved futile. It was agreed that previous to the discontinuance of the office of "division manager," the defendant had had some agency relation with the corporation. All of the items in the account annexed which were material were for transactions which occurred after the defendant ceased to be "division manager." In letters to the defendant in May, the general manager of the corporation used the term "agent" as to the defendant. At the termination of his relations with the corporation in July, the defendant had on hand certain supplies and contended that he then had a right to return the supplies and have credit for them. The corporation refused to receive the supplies, and the defendant contended that he was entitled to credit for them in

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the action by the assignee. The parties agreed that, if the defendant's contentions were not sustained, judgment should be entered for the plaintiff on the account annexed, and that if his contentions were sustained the case should be referred to an assessor to determine the amount of the credit to which he was entitled. The presiding judge ordered a verdict for the plaintiff. *Held*, that the verdict was ordered improperly, since there was evidence for the consideration of the jury in support of the defendant's contention. *Cox* v. *Savage*, 501.

Scope of Authority.

Declaration of superintendent of mill of petitioner for registration of title to certain land, to effect that passageway must be kept open across land for use of respondent, was held to be admissible in evidence after death of superintendent at trial of issues raised by petition, see WAY, 7.

Ratification by Principal of Acts of Agent.

Promissory note given in purchase of land by charitable corporation and purporting to be made by corporation, which was held not to bind corporation because neither from by-laws nor from any other source did officers who executed it have power to do so, and because, although corporation had entered into possession of land and retained it, such acts under circumstances could not be held to be ratification of acts of officers, see BILLS AND NOTES, 6; CORPORATION, 1.

Liability of Agent to Principal.

Suit in equity for accounting, brought by owner of machinery against partnership, who under contract of agency had agreed to sell machinery for plaintiff and had defrauded him, and also against corporation to which partnership assets had been transferred, where there was crossbill by corporation against defrauding partners, see EQUITY JURISDICTION, 15, 16, 29; EQUITY PLEADING AND PRACTICE, 6, 7; FRAUDS, STATUTE OF, 2.

Liability of Principal to Agent.

Liability of principal for personal injuries received by agent while at work within scope of employment, see NEGLIGENCE, 4–19; LABOR, 1–8; JOINT TORTFEASOR, 1.

Constitutionality of St. 1911, c. 751, affecting such liability, see WORKMEN'S COMPENSATION ACT, 1–6.

AMENDMENT.

After return of officer on execution has been amended, recording of amended return has same effect as if return originally had read as amended, see EXECUTION, 1.

ANIMAL.

Action against employer to recover for injury to employee caused by negligence of employer in furnishing him with horse known to employer to be

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dangerous, where it was held that fact that fellow employee's negligence contributed to injury does not bar recovery against employer, see NEGLIGENCE, 17.

APPEAL.

In suits in equity, see EQUITY PLEADING AND PRACTICE, 10, 15–17.
In actions at law, see PRACTICE, CIVIL, 16; ATTORNEY AT LAW, 4.
From Land Court, see WAY, 8.

ARBITRAMENT AND AWARD.

Construction of certain building contract, where it was held that architect was constituted arbitrator to determine certain questions, and that, so long as he acted honestly and with reasonable efficiency, his action was binding on parties, and that under circumstances of case judge who heard case without jury was warranted in holding that certain action of architect was binding on parties, see CONTRACT, 5, 6, 8.

ARCHITECT.

Construction of certain building contract, where it was held that architect was constituted arbitrator to determine certain questions, that, so long as he acted honestly and with reasonable efficiency, his action was binding on parties, and that under circumstances of case judge who heard case without jury was warranted in holding that certain action of architect was binding on parties, see CONTRACT, 5, 6, 8.

ARREST.

Indictment and trial for murder of deputy sheriff as he was attempting to arrest defendant on suspicion of his having committed felony, involving among other questions right of officer to make such arrest under circumstances, see HOMICIDE, 1–11; OFFICER, 1–3.

ASSESSMENT.

See TAX, 1–4, 12.

ASSIGNMENT.

Attempt by husband to assign rights in policy which his wife had procured upon his life, which was ineffectual because under circumstances he had no rights to assign; but assignment by wife of her rights under same policy was held to be valid, see INSURANCE, 3, 4.

At trial of action upon bond given by contractor to town, conditioned upon performance of contract which was not assignable by contractor except with assent in writing of sewer commissioners of town indorsed thereon, where it appeared that contractor had attempted to assign contract and assignee had performed some of work, but that no assent in writing had

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been given, evidence, tending to show that board of sewer commissioners knew and did not object to contract being performed by person other than contractor named therein, was held under circumstances not to be evidence that town assented to assignment of contract or waived contract's provisions, or of novation accepting assignee in place of contractor, see PRACTICE, CIVIL, 4.

ATTACHMENT.

Dissolution by bond, see BOND, 1.

Attachments, by plaintiffs in other actions, intervening between attachment on mesne process in certain action and levy of execution thereon, do not affect rights under levy, see EXECUTION, 2.

Requirement of registering of copy of execution under authority of which land has been taken applies only where land thus taken had not previously been attached on mesne process, see EXECUTION, 3.

ATTORNEY AT LAW.

Disbarment Proceedings.

1. In disbarment proceedings the technical nicety of common law criminal pleading is not required. Where in such proceedings the respondent is fully and fairly informed of the general nature of the charges against him, and in a broad sense the proof corresponds with the allegations of the petition, and the evidence has been received without objection, the respondent, after a full and fair trial, cannot object to a finding against him on the ground of variance, even if there was a slight variation between the proof and the allegations of the petition. *Boston Bar Association* v. *Scott*, 200.
2. After a full hearing has been had upon a petition for the disbarment of an attorney at law, as in other cases, a motion for a new trial depending on the weight of evidence is addressed wholly to the discretion of the trial judge, and is not open to revision. *Ibid.*
3. At the hearing of a petition for the disbarment of an attorney at law on the ground that the respondent filed false certificates as to the attendance of witnesses not in good faith and knowing them to be false, there was evidence that the respondent, who as attorney for a plaintiff had obtained a verdict, filed six witness certificates as a basis for the taxation of costs, bearing the names of seven witnesses and showing attendance for thirty-three days, whereas the witnesses had been actually in court not more than five days and the respondent could not reasonably have called them for more than eight or nine days at the most, and even this was not necessary because for thirty-one of the days certified to there was "a clear and explicit agreement" between the respondent and the attorney for the defendant that neither of them "needed to get ready" nor to "keep witnesses around" until notified by the other. It appeared that the counsel for the defendant, who by inadvertence had failed to give notice of a desire to be present at the taxation of costs, after an execution had issued for an amount including witness fees based on the false certificates, filed a motion

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to vacate the judgment on account of the fraudulent certificates, and that the motion was denied for lack of jurisdiction. In the disbarment proceedings the respondent requested a ruling that the questions involved had been adjudicated in the respondent's favor by the denial of the motion to vacate the judgment in the action in which the costs alleged to be fraudulent were allowed. *Held*, that the order denying the motion, having been made on the ground of want of jurisdiction, did not involve the issues on trial upon the petition for disbarment. *Boston Bar Association* v. *Scott*, 200.

4. Where, on exceptions and an appeal by the respondent in disbarment proceedings to and from an order made by a judge of the Superior Court that the respondent be suspended from his office of attorney at law for three years, where the reprehensible conduct charged was the fraudulent collection of excessive witness fees, and, on conflicting evidence, the judge found that "the witnesses' certificates prepared and filed by the respondent were false and were known by the respondent to be false and were not made in good faith, but were improper, illegal and fraudulent," and that in his conduct respecting them "the respondent acted improperly and dishonestly and committed a fraud upon the defendant" in the action in which the witness fees were taxed as costs, it was *held*, that the determinations of fact by the trial judge, who saw the witnesses and could base his conclusions upon his personal observation of them and their voices, manner and facial expression in testifying, were not open to revision by this court; *and also*, that a careful reading of the record showed that no error was committed and that the findings and the order made by the judge were amply warranted. *Ibid.*

ATTORNEY GENERAL.

Decree of Probate Court allowing accounts of administrator of estate and ordering distribution, where there was no reference in proceedings to inheritance tax and no provision was made for its payment and Commonwealth was not made party to proceedings, is no defense to information by Attorney General seeking to collect that tax, see TAX, 11.

AUDITOR.

See PRACTICE, CIVIL, 3, 4.

AUTOMOBILE.

Registration of Vehicle and of Operator.

1. Explanation by KNOWLTON, C. J., of the different consequences resulting from a violation of St. 1903, c. 473, § 3, by operating an unregistered automobile upon a highway and a violation of § 5 of the same chapter by operating a registered automobile upon such highway without a license as a chauffeur or operator. *Bourne* v. *Whitman*, 155.
2. Under the provisions of St. 1903, c. 473, § 5, that no person shall "operate an automobile or motor cycle upon any public highway or private way laid out under authority of statute unless licensed so to do under the pro-

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visions of this act," and that "No person shall operate an automobile or motor cycle for hire, unless specially licensed by the commission so to do," the operation of an automobile upon a highway without a license, although by other provisions of the statute it is made a punishable act, does not render the operator a trespasser on the highway. *Bourne* v. *Whitman*, 155.

3. St. 1903, c. 473, § 4, relating to the issuing by the highway commission of licenses for operating automobiles and motor cycles, as amended by St. 1905, c. 311, § 4, contains the following clause: "The provisions of this section shall not prevent the operation of automobiles by unlicensed persons if riding with or accompanied by a licensed chauffeur or operator." Section 5 of St, 1903, c. 473, declares that "Except as hereinafter provided" no person shall operate an automobile or motor cycle "unless specially licensed by the commission so to do." *Held*, that the failure of the Legislature to change the word "hereinafter" to "herein" in § 5, when making the above-quoted amendment to § 4, was a mere inadvertence, which does not affect the construction of the statute, and that under the authority of the amendment an unlicensed person may operate an automobile if riding with or accompanied by a licensed chauffeur or operator. *Ibid.*

4. In the provision of St. 1903, c. 473, § 4, as amended by St. 1905, c. 311, § 4, that an unlicensed person may operate an automobile "if riding with or accompanied by a licensed chauffeur or operator," the words "riding with or accompanied by" contemplate a proximity sufficient to enable the licensed operator to maintain such supervision as may be necessary for safety and to render assistance. *Ibid.*

5. Under St. 1903, c. 473, § 4, as amended by St. 1905, c. 311, § 4, if an unlicensed person, who is operating an automobile "riding with or accompanied by a licensed chauffeur or operator," is a person of great skill and experience, whose license expired only the day before and who is expecting another license within a day or two, the supervision and reasonable proximity of the accompanying operator required by the statute are not so constant and so close as would be required if the unlicensed person were one learning to use an automobile, but, in order to establish the relation contemplated by the statute, both of the persons must have knowledge that the actual operator is unlicensed and that the licensed chauffeur or operator accompanying him is in a position to advise or assist him with reasonable promptness, if necessary. *Ibid.*

Operation.

6. St. 1909, c. 534, § 16, provides that every person operating a motor vehicle shall run it at a rate of speed no greater than is reasonable and proper, and that "it shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper" if such a vehicle is operated in excess of certain rates of speed in certain designated districts. At the trial of a complaint charging a violation of that statute, it was *held*, that the burden of showing that the defendant was operating a motor vehicle at a speed greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public, was upon the Commonwealth; and that, even if the speed at which the defendant was operating was such as to make

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out a *prima facie* case for the Commonwealth under the provisions of the statute, still the burden of proof did not change, and hence in some cases a defendant may be convicted even if he has not exceeded the rate named in the clauses of the statute referred to, and in some cases he may be acquitted even though he may have exceeded it. *Commonwealth* v. *Cassidy*, 24.

7. At the trial of a complaint charging a violation of St. 1909, c. 534, § 16, which provides that every person operating a motor vehicle shall run it at a rate of speed no greater than is reasonable and proper, and that "it shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper" if such a vehicle is operated in excess of certain rates of speed in certain designated districts, it is erroneous for the presiding judge to refuse to give the following ruling: "There is no absolute or fixed speed limit at which automobiles may be operated in this Commonwealth; and if the jury find that the rate of speed was reasonable and proper, having regard to the traffic, use of the way and safety of the public, they should find for the defendant, no matter at what particular rate of speed they find he operated." *Ibid.*

8. At the trial of a complaint charging a violation, by one operating an automobile in a city, of St. 1909, c. 534, § 16, which provides that every person operating a motor vehicle shall run it at a rate of speed no greater than is reasonable and proper, and that "it shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper" if such a vehicle is operated on any way inside the thickly settled part of a city at a rate of speed exceeding fifteen miles an hour for a distance of one-eighth of a mile, it is erroneous for the presiding judge to refuse to give the following ruling: "If the jury find that the defendant operated an automobile at a rate of speed in excess of fifteen miles an hour for one-eighth mile within the thickly settled part of the city, the jury should find for the defendant if they find that the rate of speed was not greater than was reasonable and proper having regard to the traffic, the use of the way and the safety of the public." *Ibid.*

9. At the trial of a complaint charging a violation of St. 1909, c. 534, § 16, which provides that every person operating a motor vehicle shall run it at a rate of speed no greater than is reasonable and proper, and that "it shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper" if such a vehicle is operated in excess of certain rates of speed in certain designated districts, it is erroneous for the presiding judge to charge the jury in substance that, if they find that the defendant was operating a motor vehicle in a district and at a rate of speed designated in the statute as making out a *prima facie* case for the Commonwealth, and "there were no circumstances for the safety of the public or traffic in the road, or special conditions requiring a greater rate of speed," they "should return a verdict of guilty." *Ibid.*

10. St. 1909, c. 534, § 16, which section went into effect on July 1, 1909, provides that every person operating a motor vehicle shall run it at a rate of speed no greater than is reasonable and proper, and, among other provisions, that it shall be *prima facie* evidence of a rate of speed greater than is reasonable and proper if a motor vehicle is operated "on any way upon approaching an intersecting way, or in traversing a crossing or intersection

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of crossings" at a rate exceeding eight miles an hour. Section 1 of the statute defines "intersecting way" to mean "any way which joins another at an angle, whether or not it crosses the other." By § 33, all of the statute excepting certain designated sections, among which § 1 was not, and § 16 was, included, went into effect on December 31, 1909. Section 16 went into effect on July 1, 1909. At the trial of a complaint alleging a violation on December 2, 1909, of § 16, it appeared that the defendant was operating an automobile in excess of eight miles an hour at a point where two streets joined at an angle the street upon which he was, and one only of the two continued across that street, doing so under another name. The defendant asked for a ruling that there was no evidence "of more than one intersecting way or intersection of ways at the time the alleged offense was committed." The ruling was refused. *Held*, that the ruling was refused rightly, because, in spite of § 33, the definition of "intersecting way" in § 1 must be held to be applicable to that term as used in § 16. *Commonwealth* v. *Cassidy*, 24.

Difference between operation of unregistered automobile on highway and operation of automobile by unregistered driver, see *ante*, 1.

Action by marketman against owner of automobile driven by inattentive driver for injuries caused by automobile being run into plaintiff as he was crossing street in market district, see NEGLIGENCE, 39.

Act of driver of automobile truck which threw fellow employee from truck and killed him was held to be act of fellow servant and not of superintendent, so that employer was not liable, see NEGLIGENCE, 13.

Proprietor of "sight-seeing automobile" was held to be bound to exercise toward passengers highest degree of care consistent with proper transaction of business, whether or not he technically was common carrier of passengers, see CARRIER, 3.

Garage.

Maintenance upon certain land of automobile garage was held not to be prohibited by restriction in deed against maintenance of stable, but to be prohibited by restriction against maintenance on land of any building except "usual outbuildings appurtenant" to dwelling house of certain class, see EQUITABLE RESTRICTIONS, 2, 3, 5, 7.

BENEVOLENT INSTITUTION.

Exemption from taxation of equitable interest of such institution in fund held in trust for it, see TAX, 17.

BETTERMENT.

See TAX, 5, 6.

BILLS AND NOTES.

What constitutes Promissory Note.

1. The following instrument, "Boston, Mass., September 3, 1903. Borrowed and received from George M. Bryne, five hundred and eighty-five dollars,

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payable April 1, 1904, with interest at six per cent. J. L. Bryne," is as matter of law a non-negotiable promissory note, and its maker, when sued on it as such, cannot be allowed to show that he intended it to be only a memorandum. *Bryne* v. *Bryne*, 179.

Validity.

2. In determining whether, in the hands of a *bona fide* purchaser for value before maturity, a note of a city, having upon it certificates of various votes of the city council and of its committee on finance and a certificate of the city treasurer, is a valid obligation which can be enforced against the city, all that appears in writing or print upon the note may be taken as a part of it. *Brown* v. *Newburyport*, 259.
3. In the body of a promissory note of a city, signed in its behalf by its treasurer and countersigned by its mayor, was merely a promise to pay to the order of a certain person a certain amount of money. Appended to the note were certificates of the city clerk as to a vote of the city council, stating the terms upon which money in behalf of the city to a certain amount might be borrowed and notes therefor might be issued by the treasurer with the approval of a committee on finance, and as to a vote of that committee authorizing the mayor to approve notes in its behalf, a certificate of approval of the note by the mayor for the committee on finance and a certificate by the treasurer that the amount borrowed, inclusive of the note in question, was less than the limit set by the vote of the council. The certificate of the treasurer was false. The note was sold before maturity by the payee to a purchaser for value. *Held*, that the validity of the note, even in the hands of a *bona fide* purchaser, depended upon the matters stated on it, giving to each the force to which it was entitled, and not assuming that, because it was signed by the treasurer and countersigned by the mayor, the note was authorized and valid. *Ibid.*
4. Where, from certified copies of votes appended to a promissory note of a city, it appears that a vote of the city council authorized notes to be issued by the treasurer and required that each note should be approved by the entire committee on finance, which was composed of the mayor and seven members of the council, and that the committee on finance by a perfunctory vote attempted to delegate the duties and powers thus conferred upon it to the mayor for the entire year and that the note in question was approved "for the committee" by the mayor alone without other action by the committee, every holder of the note is charged with knowledge of the invalidity of the committee's action and of the fact that the note was issued without authority. *Ibid.*
5. A city council authorized and directed the city treasurer in anticipation of taxes "to borrow from time to time, with the approval of the committee on finance, a sum or sums" aggregating a certain amount. The committee on finance was composed of the mayor and seven members of the council. It passed a vote "that the mayor and city treasurer be authorized to negotiate notes under the provisions of the order" of the council "from time to time as may be required." *Held*, that the vote of the committee was not within the powers and duties conferred upon them by

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the vote of the council, and that a note, executed by the mayor and treasurer in accordance with the vote of the committee and negotiated to a *bona fide* purchaser for value before maturity, did not bind the city. *Brown* v. *Newburyport*, 259.

6. A charitable corporation bought a parcel of real estate, and its trustees passed a vote purporting to authorize the president and treasurer to "execute and sign the necessary papers." The by-laws of the corporation required the presence of two thirds of the whole number of trustees to authorize the purchase and sale of real estate, and only eight of the fifteen trustees were present when the vote was passed. A fraudulent agent acted for the corporation in negotiating a purchase of the real estate, which was paid for and was conveyed to the corporation. He falsely represented the price to be $2,000 more than it was, and agreed to lend this sum of money to the corporation to complete the purchase. For this pretended loan the president and the treasurer executed a note for that amount purporting to be a note of the corporation, which the fraudulent agent assigned to a bank as security for a note of his own. The officers of the corporation did not ascertain the facts until long after the transaction was completed and the corporation had entered into possession of the real estate. In an action by the bank against the corporation on the note, it was *held*, that, assuming the plaintiff to be a holder in due course, so that the defenses that the note was obtained by fraud and that it was without consideration were not open, the defense that the note was not made by the defendant because executed without authority was good, unless the transaction had been ratified, and that it had not been ratified, because the retention of the real estate, although a ratification of the purchase, was not a ratification of the action of the president and treasurer in giving to the fraudulent agent a note which was not a part of the actual purchase of the property. *Peoples National Bank* v. *New England Home for Deaf Mutes, &c.*, 48.

Note purporting to be made by president and treasurer of charitable corporation and in its name and behalf does not bind it unless president and treasurer had special authority to do so, see CORPORATION, 1.

Indorsement.

Where, at trial of action by corporation against administrator on promissory notes, it appears that notes were signed by intestate and were indorsed in blank by payee who had delivered them to plaintiff on its paying to him their amount, and there is circumstantial evidence that when intestate signed notes he did so under agreement with corporation to hold him harmless, there is question for jury as to whether, when plaintiff paid amount of notes to payee, it did not pay its own notes and extinguish them, see CONTRACT, 13.

Wife may take and hold by transfer from third person note and mortgage of personal property upon which husband is liable primarily, and, while she cannot enforce them in her own name against husband, she can transfer them to another who can enforce them for her, see HUSBAND AND WIFE, 2, 3.

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Bona fide Purchaser.

Note of city treasurer bearing certificate showing it to have been approved by only one member of finance committee where all members should have acted, was held to be invalid even in hands of *bona fide* purchaser, see *ante*, 2, 3, 5.

Payment.

Where, at trial of action by corporation against administrator on promissory notes, it appears that notes were signed by intestate and were indorsed in blank by payee who had delivered them to plaintiff on its paying to him their amount, and there is circumstantial evidence than when intestate signed notes he did so under agreement with corporation to hold him harmless, there is question for jury as to whether, when plaintiff paid amount of notes to payee, it did not pay its own notes and extinguish them, see CONTRACT, 13.

Bank Check as Payment.

Whether acceptance and collection of check, proffered upon condition that it is in full settlement of unliquidated claim, even though accompanied by protestations that it is not so received, bars attempt to collect balance, see ACCORD AND SATISFACTION, 1.

Whether acceptance and collection of check bearing words "in full to date" effected accord and satisfaction, see ACCORD AND SATISFACTION, 1–3.

BONA FIDE PURCHASER.

Conveyance in trust, where, although grantor reserved no power of revocation, property was held not to have passed to beneficiary with all attributes of ownership independently of death of grantor, so that, beneficiary not being "*bona fide* purchaser for full consideration in money or money's worth," succession tax should be paid, see TAX, 15, 16.

Person who enters into contract to purchase land not knowing that land is subject to unrecorded lease for term exceeding seven years, and who before consummation of purchase learns of lease but completes purchase nevertheless, is not in position of purchaser of land for value without notice of lease, but takes land subject to it, and cannot compel lessee who sues to establish his rights to reimburse him to any extent, see EQUITY JURISDICTION, 23, 24.

Rights of *bona fide* purchaser of note of city illegally issued, see BILLS AND NOTES, 2, 3, 5.

BOND.

To dissolve Attachment.

1. Where a sum of money, which by agreement of the parties to an action has been placed in the hands of an attaching officer in substitution for an attachment of real estate, has been attached by supplementary process under R. L. c. 167, § 80, this last attachment may be dissolved by a bond, in which the condition is to pay unconditionally any final or special judgment in the action and of which the penal sum is not double the amount

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Bond (*continued*).

of the damages demanded in the writ, if the creditor voluntarily consents to accept the bond as security for the debt in place of his attachment. Such consent need not be express, but may be found from the fact that the counsel for the attaching creditor, who inspected the bond and examined the sureties before a master in chancery, made no objection to the form of the instrument, especially when this is confirmed by the additional fact that the attaching creditor in his answer in another proceeding relating to the same deposit of money admitted that the attachment had been dissolved by the bond and that the debtor had become entitled to recover the deposit. *Wall* v. *Kelly*, 370.

Construction.

2. A bond with sureties, given to a city by its treasurer and collector of taxes, after reciting the election of such officer "for the current municipal year," provided that, if he "shall well and truly perform all of the duties and responsibilities which devolve upon him by virtue of his acceptance of the two offices aforesaid during the term for which he has been elected and for such further term or terms or portion of a term for which he may be elected or for which he may serve and if [he] shall annually not later than the first Monday in February, obtain the approval in writing of the mayor and aldermen of said city . . ., then this obligation shall be void, otherwise it shall remain in full force." The officer was elected for several successive years without a new bond being given. *Held*, that, the obtaining of "the approval of the mayor and aldermen," whatever that provision in the bond might mean, not being a condition precedent to the continuation of the obligation, the obligation expressed in the bond was not limited to the current municipal year, but continued through successive years of continuous election to and service in the offices of treasurer and collector of taxes. *Newburyport* v. *Davis*, 126.

Validity.

3. The mere fact that a bond given to a city by its treasurer and collector of taxes, which by its terms was a continuing obligation during successive terms of office of the obligor, was not approved by the mayor and aldermen as required by R. L. c. 25, § 72; c. 26, § 2, and by ordinances of the city, will not prevent recovery thereon by the city in case of its breach, if it is good as a common law bond. *Newburyport* v. *Davis*, 126.

Termination.

4. A bond given to a city by its treasurer and collector of taxes, which by its terms is a continuing liability during the current term of that officer and successive terms for which he is elected and in which he serves, is terminated by the giving of a new bond of the same character. *Newburyport* v. *Davis*, 126.

Breach.

5. In an action by a city upon the bond of its treasurer and collector of taxes, negligence of other officers of the city in not discovering defalca-

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tions of the treasurer which constituted the breaches of the bond is no defense. *Newburyport* v. *Davis*, 126.

6. In an action by a city against a surety upon a bond given by its treasurer and collector of taxes, it appeared that the treasurer had embezzled large sums of money which were in his possession as treasurer, and then fraudulently had issued notes of the city which he had power to negotiate as a borrowing agent of the city and had applied the proceeds thereof to cover his direct embezzlements as treasurer. The defendant contended that the wrongdoing which had resulted in financial harm to the city was not a wrongdoing of the treasurer or collector of taxes, and therefore that the defendant was not liable. *Held*, that the character of the original embezzlement of the treasurer, which constituted a breach of the bond, was not changed by its temporary concealment through his fraudulent acts as borrowing agent of the city. *Ibid.*

Action by town against surety on bond of contractor, see PRACTICE, CIVIL, 4; SURETY, 1, 2.

Damages recoverable for Breach.

7. Although, in an action against the surety upon a bond for a penal sum conditioned upon the proper performance of his duties by a public official, if there is a verdict for the plaintiff, judgment is entered for the penal sum of the bond and the amount of the execution is determined later, there is no reason for not determining the amount for which execution should issue at the same time with the question of liability when the record is ripe for it. Such a case arises when the record shows that the loss sustained by the obligee far exceeds the penal sum of the bond. *Newburyport* v. *Davis*, 126.

8. In an action by a city against a surety upon the bond of its treasurer and collector of taxes, it appeared that the treasurer had embezzled a large amount of money which he had replaced with the proceeds of a note which he had negotiated fraudulently as borrowing agent of the city, and that at the time of the trial of the action upon the bond, an action against the city upon such note was pending. *Held*, that the initial embezzlement constituted a breach of the bond and therefore that judgment should be entered for the plaintiff, and that the amount for which execution should issue should be determined after the termination of the action upon the note. *Ibid.*

BOWDOIN COLLEGE.

Bowdoin College is not exempt from paying tax on successions and inheritances passing to it in this Commonwealth, see TAX, 18, 18.

BRIDGE.

Expense of construction of temporary bridge used by public while Craigie Bridge was being removed in making of Charles River basin was held rightly to have been included as part of cost of removal of Craigie Bridge by commission apportioning expenses, see COMMISSIONERS TO APPORTION EXPENSE OF METROPOLITAN PARKS DISTRICT, 3.

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Brokers.

BROKERS.

STOCKBROKERS, see that title.

CARRIER.

Of Goods or Animals.

1. Where a carrier of goods or animals makes a material departure from the method of transportation, this, like a deviation from the designated route, avoids the express contract of carriage and all provisions as to limitation of damage contained in it, at least at the election of the shipper. *McKahan* v. *American Express Co.* 270.
2. Where an express company makes a contract in writing for the transportation of a certain number of horses from a place in Indiana to a city in this Commonwealth in a time not to exceed thirty-six hours, and the shipper agrees that an attendant shall accompany and take charge of the horses, the express company furnishing free transportation for the attendant, and the shipper by the same contract declares the value of the horses to be $75 each and agrees that the express company shall in no event be liable for damages for injury to any of the horses in excess of the sum declared by the shipper to be the value thereof, if the express company during the transportation separates the horses from their attendant furnished by the shipper, against the attendant's objection, and in consequence the horses are injured by detention in the cars for a period of forty-four hours without being fed or watered, the carrrier's departure from the agreed method of transportation displaces the contract of carriage and releases the shipper from all limitations upon the carrier's liability which he agreed to therein, so that he is entitled to recover from the carrier full compensation for his loss, it here not being necessary to decide whether his proper remedy is in tort for the conversion or upon an implied contract arising from the fact of shipment. *Ibid.*

Of Passengers.

Sight-seeing automobile.

3. The proprietor of a sight-seeing automobile, designed to carry about twenty-five persons, who has a regular stand from which the vehicle starts on regular trips over regular routes at stated hours, for which tickets are placed for sale at various hotels at a stated price for each trip, while he is transporting on such sight-seeing trips persons who have purchased tickets thus offered for sale, is bound to exercise toward his passengers the highest degree of care consistent with the proper transaction of the business, whether or not he technically is a common carrier of passengers. *Hinds* v. *Steere*, 442.

Liability for baggage of passenger.

4. The fact, that a railroad corporation has inserted in its schedules of rates, fares and charges, filed and published under the orders of the interstate commerce commission, a statement that "baggage liability is limited to personal baggage not to exceed $100 in value for a passenger presenting

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a full ticket . . . unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of taking the baggage," does not make such limitation of liability a part of the established rate filed with the commission and thus binding on passengers whether they knew of it or not. *Hooker* v. *Boston & Maine Railroad*, 598.

5. It here was assumed that the subject matter of passengers' baggage in interstate travel is within the control of Congress. *Ibid.*

6. The interstate commerce act does not change the common law rule prevailing in this Commonwealth, that a passenger on a railroad is not bound by a limitation of liability of the corporation operating the railroad as to the amount in value of personal baggage which will be carried upon a passenger ticket without extra charge and for which the corporation will be liable in case of loss, unless the passenger agreed to such limitation by express contract or by assent to a known regulation. *Ibid.*

Liability for personal injuries to passengers.

Actions by passengers against street railway company for injuries alleged to have been caused by negligence of its servants and agents, see NEGLIGENCE, 20, 21.

Limitation of Liability.

Provision in contract of carriage by express company limiting extent to which it could be held liable for injury to goods or animals in transportation becomes of no effect when carrier makes material departure from method of transportation, in which case shipper becomes entitled to recover full compensation for any loss sustained through carrier's breach of contract, see *ante*, 1, 2.

CERTIORARI.

That petition for writ of certiorari would have been proper remedy to correct wrongful assessment of betterments, was assumed but not decided, see TAX, 5.

CHARITY.

Exemption from taxation of equitable interest of charitable institution in fund held in trust for it, see TAX, 17.

Bowdoin College is not exempt from paying tax on successions and inheritances passing to it in this Commonwealth, see TAX, 13, 18.

Legacy to charitable "mission" which was "not to take effect unless" certain person at testator's death was alive and "in charge of" mission, lapsed because that person died before testator, see DEVISE AND LEGACY, 8.

Promissory note, given in purchase of land by charitable corporation and purporting to be made by corporation, which was held not to bind corporation because neither from by-laws nor from any other source did officers who executed it have power to do so, and because, although corporation had entered into possession of land and retained it, such acts under circumstances could not be held to be ratification of acts of officers, see BILLS AND NOTES, 6; CORPORATION, 1.

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CHARLES RIVER BASIN.

Powers of commissioners to apportion expenses of Metropolitan Parks District in regard to apportionment of expenses of Charles River basin and removal of Craigie Bridge, finality of their determinations, extent of their discretion and propriety of certain of their awards, see COMMISSIONERS TO APPORTION EXPENSES OF METROPOLITAN PARKS DISTRICT, 1–3.

CHARTER PARTY.

Action by owner of steamship for breach of charter party for hire of ship where ship was unseaworthy for time, see CONTRACT, 9.

CHILD.

General principles of law relative to determining whether child is exercising due care, see NEGLIGENCE, 1, 2.

Action for injuries to child playing on public way, see NEGLIGENCE, 34–36.

Action by child less than fourteen years of age, employed in factory contrary to provision of St. 1909, c. 514, §§ 56, 61, to recover for injuries of which employment contrary to law was proximate cause, see LABOR, 1–8.

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CODICIL.

Attestation of codicil of will by one interested under provision of codicil and also under provision of will was held to make provision in codicil as to that person void, but not to affect provision in will, which that witness did not attest, see WILL, 1.

COLLECTOR OF TAXES.

Remedy of purchaser at sale of real estate for collection of taxes, in case there is defect in sale, is not by action of contract against collector of taxes upon warranty in tax deed, but is to comply strictly with provisions of R. L. c. 13, § 44, see TAX, 22.

COLLEGE.

As to taxation of property devised or bequeathed to Bowdoin College in this Commonwealth, see TAX, 13, 18.

COLUMBIA ROAD.

In petition for certiorari, assessment of betterments resulting from layout and construction of Columbia Road in Boston was held not to be illegal although large portion of it, including portion adjacent to petitioner's

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land, was superimposed upon way formerly laid out and constructed as parkway, see TAX, 5.

Ruling to same effect in suit in equity, see TAX, 6.

COMMISSIONERS TO APPORTION EXPENSES OF METROPOLITAN PARKS DISTRICT.

1. The commissioners to apportion the expenses of the metropolitan parks district, appointed under St. 1899, c. 419, as amended by St. 1903, c. 465, § 9, and St. 1906, c. 402, § 2, in regard to the apportionment of the expenses of the Charles River basin, formed by a dam substantially on the site of Craigie Bridge, and of the removal of Craigie Bridge and the construction of a suitable bridge in place thereof, like other similar commissioners, are clothed with a wide judicial discretion as to the considerations which should guide them in making the apportionment, and, although their report must be passed upon by the court, the court to which it is submitted will be slow to disturb an award, except in the event of its appearing to be extravagant and unreasonable or based on an unsound interpretation of the statutes or an erroneous view of the law, and, so far as the commissioners proceed within their powers, act reasonably and violate no constitutional right, their determination will not be disturbed. *In re Metropolitan Park Commissioners*, 381.
2. The commissioners to apportion the expenses of the metropolitan parks district, appointed under St. 1899, c. 419, as amended by St. 1903, c. 465, § 9, and St. 1906, c. 402, § 2, in regard to the expenses of the Charles River basin, formed by a dam substantially on the site of Craigie Bridge, and of the removal of Craigie Bridge and the construction of a suitable bridge in place thereof, are not required by the terms of the last named statute to apportion the expenses of the Charles River basin in the same manner that is adopted in apportioning the general metropolitan parks expenses. *Ibid.*
3. The commissioners to apportion the expenses of the metropolitan parks district, appointed under St. 1899, c. 419, as amended by St. 1903, c. 465, § 9, and St. 1906, c. 402, § 2, in regard to the apportionment of the expenses of the Charles River basin, formed by a dam substantially on the site of Craigie Bridge, and of the removal of Craigie Bridge and the construction of a suitable bridge in place thereof, properly may include as a part of "the cost of the removal of Craigie Bridge and the construction of a suitable bridge in place thereof" the expense of a temporary bridge used by the public during the period of construction, it being a fair implication from the tenor of the statute that the expense of this temporary structure should be borne in the same way as the expense for the permanent accommodation of the travelling public. *Ibid.*

CONCENTRATED MILK.

Having in possession with intent to sell product called "concentrated milk" was held not to be violation of R. L. c. 56, § 55, prohibiting having in possession with intent to sell milk to which water or some foreign substance had been added, see MILK, 3, 4.

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CONFLICT OF LAWS.

Determination of question, what law governs construction of contract of insurance and rights of parties, where policy was applied for and was delivered and premiums all were paid in the Commonwealth, and both insured and beneficiary live here, and company is incorporated in another State where money will be paid on death of insured, see INSURANCE, 1.

CONSPIRACY.

Bill in equity against several defendants to relieve plaintiff from results of fraud and deceit alleged to have been practised upon plaintiff by one of defendants and to have been conspired in by all of them, see EQUITY JURISDICTION, 17, 18.

CONSTITUTIONAL LAW.

1. The limits of the constitutional power of the Legislature to apportion the expense of a public improvement among the cities and towns benefited thereby have never been determined, but it can be said that, if the principles applied in the assessment of the municipalities would be constitutional as applied to individuals, there can be no just ground for complaint. *In re Metropolitan Park Commissioners*, 381.

St. 1891, c. 425, as amended by St. 1902, c. 473, with regard to tax on successions and inheritances, was held to be constitutional, see TAX, 8.

Right of peace officer to arrest without warrant person whom he suspects on reasonable grounds of having committed felony is not in conflict with constitutional guaranties, see OFFICER, 3.

Constitutionality of proposed statute, now St. 1911, c. 751, relating to compensation for injuries received by employees in course of their employment or for death resulting therefrom, and of the various provisions thereof, see WORKMEN'S COMPENSATION ACT, 1–6.

CONSTRUCTION.

Of contract, see CONTRACT, 3–7; PRACTICE, CIVIL, 1, 2; EQUITY JURISDICTION, 27; EVIDENCE, 5; INSURANCE, 1.
Of bond, see BOND, 2.
Of deed, see TAX, 6; EQUITABLE RESTRICTIONS, 1–4, 7.
Of equitable restrictions in deed, see EQUITABLE RESTRICTIONS, 1–4, 7.
Of statutes, see STATUTES CITED AND EXPOUNDED, p. 773.
Of trusts, see TRUST, 1, 2; DEVISE AND LEGACY, 5; TAX, 15, 16.
Of wills, see DEVISE AND LEGACY, 1–8.
Of certain words, see WORDS.

CONTRACT.

What constitutes.

1. A printed circular letter sent by a manufacturer of a certain kind of revolvers to a jobber in the trade, setting forth the terms and conditions

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upon which orders for the revolvers will be filled, is not an offer that can be accepted by a reply ordering a certain number of the revolvers, but is only an announcement that the manufacturer will receive proposals for sales on the terms and conditions stated, which when received may be accepted or rejected. Accordingly such an order before its acceptance by the manufacturer creates no contract. *Montgomery Ward & Co.* v. *Johnson*, 89.

Case determining that liability of carrier for loss of baggage of passenger is not limited by stipulation printed in schedule of rates, fares and charges filed with interstate commerce commission, in absence of knowledge thereof by passenger, see CARRIER, 4, 6.

Where, at trial of action by corporation against administrator on promissory notes, it appears that notes were signed by intestate and were indorsed in blank by payee who had delivered them to plaintiff on its paying to him their amount, and there is circumstantial evidence that when intestate signed notes he did so under agreement with corporation to hold him harmless, there is question for jury as to whether, when plaintiff paid amount of notes to payee, it did not pay its own notes and extinguish them, see *post*, 13.

Liability assumed by one who becomes stockholder in corporation formed in State having certain statutes on subject, see CORPORATION, 3.

Determination of question, what law governs construction of contract of insurance and rights of parties, where policy was applied for and delivered and premiums all were paid in this Commonwealth, and both insured and beneficiary live here, and company is incorporated in another State where money will be paid on death of insured, see INSURANCE, 1.

Consideration.

Guaranty by father of payment of account of son which was held to be unenforceable because there was no consideration for it, see GUARANTY, 1.

Validity.

2. The principle of law, that mere ignorance of the contents of a contract in writing which a party voluntarily executes is not sufficient ground for setting it aside when he subsequently discovers that its contents are different from what he supposed them to be, was applied in this case where the party seeking to set aside the contract was an old foreigner who was led to sign the instrument through deception practised upon him by his son, in which the other party to the contract in no way participated. *Atlas Shoe Co.* v. *Bloom*, 563.

Validity of bond of certain city treasurer and collector of taxes, see BOND, 3.

Business corporation has power to agree to reimburse maker of note which he is to sign for its benefit, and such contract is enforceable although there is no direct evidence that it was made in accordance with corporation's by-laws, compliance with by-laws being presumed, see CORPORATION, 2; *post*, 11–13.

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Construction.

3. In an action for the breach of a contract in writing, it appeared that the provisions of the contract were as follows: "For and in consideration of the surrender of a certain agreement . . . signed by W in regard to the payment of a commission, . . . I [the defendant] hereby agree to deliver to [the plaintiff] two thousand shares of the capital stock of a company formed or to be formed to take over said property. Said stock to be delivered as soon as issued; . . . above company to be known as East Butte Mining Company. In case of failure of these properties being sold as at present agreed this agreement to be null and void." At the trial of the action there was conflicting evidence as to the meaning of the words "as at present agreed," and the presiding judge under proper instructions left to the jury as a question of fact the determination of the question, what agreement was referred to by those words. *Held*, that the contract was ambiguous and that the action of the judge was proper. *Hodgens* v. *Sullivan*, 533.
4. Where, in a construction mortgage agreement relating to the erection of a dwelling house, it is stipulated that a certain payment for plastering shall be due "when said building shall be plastered and skimmed and all windows in and blinds hung," this can be found to mean that the payment shall not be due until the windows are finished with sashes and glass ready for use as completed windows, and that the windows are not "in" within the meaning of the condition when the holes for them have been made and the general frames have been inserted, with nothing further done. *Monahan* v. *William W. Babcock Co.* 13.
5. In an action of contract against a county with a declaration containing a count upon a contract in writing for the erection of a power electric and heating plant by the plaintiff for the defendant, performance of which was alleged to have been stopped unjustifiably by the defendant, and a count upon a *quantum meruit* for work done and materials furnished under the contract, it appeared that the contract provided that the work was to be done and the materials were to be furnished "under the direction of an engineer selected by the architect and to the satisfaction of the architect and such engineer," who were to be "the sole judges as to the fitness of the work and materials," and that, in case "said work or materials . . . shall be unsatisfactory to the said architect" and upon the plaintiff being notified thereof in writing, the plaintiff was to remove the unsatisfactory work or materials and to supply in place thereof "the work and materials satisfactory to the architect." It also appeared that upon the plaintiff's proposing to use in the performance of the contract a certain kind of pipe covering, the architect notified him not to do so but to use a kind made by a certain manufacturer, and that, upon the plaintiff persisting in his course, the architect terminated the contract. An auditor to whom the case was referred found that the covering that the plaintiff had proposed using conformed to the requirements of the wording of the contract and that he could not find that it was inferior in quality to that demanded by the architect, that the architect thought that the covering specified in the contract was made only by the manufacturer whose product he insisted upon, but that he was mistaken. The case subsequently was heard by a judge

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without a jury and there were in evidence the auditor's report, certain documents, and oral testimony, the weight of which seemed strongly to show that the plaintiff complied with the terms of the contract and that the architect was wholly without justification in fact for the action he took, but there was some evidence tending to show that only the kind of covering insisted upon by the architect would satisfy the terms of the contract. The judge found for the defendant, and the plaintiff alleged exceptions. *Held*, that under the contract the architect was constituted an arbitrator to determine practical questions of performance that might arise during the progress of the construction, and, so long as he acted honestly and with reasonable efficiency, his action was binding on the parties; that the evidence was not quite so conclusive as to make no finding reasonably possible except that the architect had acted unreasonably, capriciously or fraudulently, and therefore that the exceptions must be overruled. *Evans* v. *County of Middlesex*, 474.

6. A contract in writing between a county and one who agreed to erect for the county a power electric and heating plant provided that the work was to be done and the materials were to be furnished "under the direction of an engineer selected by the architect and to the satisfaction of the architect and such engineer," and that, in case "said work or materials . . . shall be unsatisfactory to the said architect," and upon the plaintiff being notified thereof in writing, the plaintiff was to remove the unsatisfactory work or materials and supply in place thereof "the work and materials satisfactory to the architect." The contract required the use of a certain pipe covering called "Air Cell Class A." The contractor proposed to use a covering which he contended answered that description, but the architect refused to accept it, and insisted that a covering made by a certain manufacturer should be used, and, upon the contractor persisting in his course, the architect terminated the contract. At the trial of an action by the contractor against the county for breach of the contract, there was evidence to substantiate the contention of the architect, as well as evidence tending to show that he was mistaken and ignorant. The contractor asked the presiding judge to rule that "if it is found that the covering furnished by the plaintiff was not inferior in quality, or otherwise, to that" which the architect insisted upon, "the architect and engineer had no legal right to reject the same for reasons stated by them in their evidence." The ruling was refused, the judge found for the defendants; and the contractor alleged an exception. *Held*, that, aside from the fact that the ruling requested a finding of fact which the judge had a right to determine against the plaintiff, so that it might have been refused properly on that ground alone, the ruling asked for did not contain an accurate statement of law, because, under the above quoted provisions of the contract, a rejection of the covering which the contractor proposed to use might have been within the legal right of the architect and engineer if they acted in good faith and not whimsically, even though they acted somewhat ignorantly or mistakenly. *Ibid.*

7. In a suit in equity for the specific performance of a contract, it appeared that the defendant was the owner of a patent for a certain machine and

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that the plaintiff and the defendant made a contract in writing that the plaintiff should have an exclusive license to manufacture and sell the patented machine for five years, the seventh paragraph of the contract stating in detail a method of accounting for and of dividing the profits of the enterprise. The eighth paragraph provided in substance that, if "at the expiration of said licenses and of this contract" the defendant did not desire to renew the contract for a further term, he should "deliver such transfers, papers and instruments as will vest in the [plaintiff] . . . fifteen one-hundredths interest in and to said patent, . . . and also fifteen one-hundredths interest in and to all the profits arising from business in machines during the life or lives of said patents . . . and also twenty one-hundredths interest in and to all the profits arising from the sale of rolls, spare parts and supplies furnished to said machines or protected in any manner by the patents aforesaid. Profits within the meaning of the foregoing provisions," it was provided, should "mean the differences between the manufacturing cost and the amount of the receipts in each instance as hereinbefore defined in Article VII., and all the provisions of that article shall apply to the parties hereto *mutatis mutandis*. And in the event the" defendant should desire "to sell said patent or patents and business done under them, and . . . obtain a *bona fide* offer therefor, then" the defendant was to communicate such offer to the plaintiff, who was to have ten days in which to "buy said patents and business" on the terms so offered, and, if he did so, he was given the right to credit "his fifteen one-hundredths interest in the purchase price and make payment for the balance of the purchase price at such times and in such manner as" might be agreed upon. In case he did not purchase, the defendant might sell to the person who had made the offer, "accounting to the [plaintiff] for his fifteen one-hundredths part of the proceeds of such sale as aforesaid. But in the event that the person making such offer" did not purchase, then no sale could be made "of said patents and business by the parties of the second part until a new offer" should "have again been submitted to the party of the first part and rejected by him in like manner as before. *Held*, that the words "interest in and to said patent," as used in the contract, meant a limited property right arising under and defined in the contract, which was less than absolute ownership, and that the plaintiff was not entitled at the termination of the contract to an assignment of the title to any part of the patent. *Copeland* v. *Eaton*, 139.

Construction of bond of certain treasurer and collector of taxes of city, see BOND, 2.

Construction of agreement as to facts made by counsel for parties in action of contract, see PRACTICE, CIVIL, 2.

Contract in writing between general contractor and plumber and piper, which was held to be plain and not subject to being varied by evidence of custom contrary to its terms, see EVIDENCE, 5.

Construction of contract between beneficiary of estate of certain decedent and one who had made advances for him in procuring enforcement of his right in such estate, see EQUITY JURISDICTION, 27.

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In action for breach of contract in writing calling for delivery of shares of stock in "company to be known as East Butte Mining Company," allegation that plaintiff had demanded shares was held under circumstances to have been supported by evidence that he had demanded shares in corporation named "East Butte Copper Mining Company," which sometimes was called "East Butte Mining Company," so that there was no variance between declaration and proof, see PRACTICE, CIVIL, 1.

Determination of question, what law governs construction of contract of assurance and rights of parties, where policy was applied for and delivered and premiums all were paid in the Commonwealth, and both insured and beneficiary live here, and company is incorporated in another State where money will be paid on death of insured, see INSURANCE, 1.

Performance and Breach.

8. By a contract in writing relating to the erection for a county of a power electric and heating plant, approval by the county commissioners of all sums to be paid for labor and materials besides those required by the contract was necessary and a method of arbitrating disputes was provided for. It also was provided that the contractor should not be entitled to demand or receive payment for any portion of the work done or materials furnished "until each and all of the specifications" of the contract "are complied with and the architect shall have given his certificate to that effect, and until all disputes, disagreements, and questions between the parties . . . affecting the right to any portion of the amount claimed shall have been settled as above provided for." The architect under other provisions of the contract caused the contractor to cease work and the contractor brought an action against the county upon an account annexed for labor and materials furnished in addition to those required by the contract, at the trial of which it appeared that the labor and materials were ordered in writing by the county commissioners representing the county, and that the architect never had fixed the fair value of them because, as he testified, "there was no necessity of my approving them until the final adjustment of the accounts." Requests for arbitration were made which came to nothing. The judge found for the defendant and the plaintiff alleged exceptions. *Held*, that the finding was warranted, since the jury might have found that the requirement in the contract of approval by the county commissioners of payments for items not called for by the contract was not waived. *Evans* v. *County of Middlesex*, 474.

9. In an action upon a charter party for the hire of a steamship for the last month of a term of hiring of seven months, it appeared that the defendant had paid for each of the six previous months and had refused to pay for the seventh month on the ground that the vessel was unseaworthy and that this gave him the right to cancel the charter party. The charter party provided that the steamship should be "tight, staunch, strong and in every way fitted for the service" when delivered to the defendant, and that the plaintiff should "maintain her in a thoroughly efficient state in hull and machinery for and during the services." It also provided that the defendant should not be liable for the vessel's hire during the time

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required for repairs. It was admitted that the vessel was tight, staunch, strong and in every way fitted for the service when delivered to the defendant. In the month before the last month of the term of the charter party the plaintiff ordered the vessel to sail on a certain day. Her master could not do so because repairs were required. The defendant thereupon notified the plaintiff that he surrendered the vessel and demanded a return of the charter. The plaintiff declined to accept the surrender. The judge, before whom the case was tried without a jury, found that the vessel when ordered by the plaintiff to sail at the time in question was unseaworthy, but that this was due to the fact that certain repairs were needed, which were completed in a reasonable time, namely, three days later, and that the vessel then was in a seaworthy condition and continued to be so until the expiration of the term of the charter party. The judge also found that "the plaintiff maintained the . . . vessel in a condition fit for the service for which it was chartered during the whole time of the charter party, except during certain periods when necessary repairs were being made." The findings of the judge were warranted by the evidence. *Held*, that there was no breach by the plaintiff of his agreement nor any failure to perform his part of the contract, and that the defendant had no right to cancel the charter party and in accordance with its terms was liable to pay for the vessel during the last month. *Banes Steamship Co.* v. *American Importing & Transportation Co.* 96.

Breach of bond of certain city treasurer and collector of taxes, see BOND, 5, 6.

In action for breach of contract in writing calling for delivery of shares of stock in "company to be known as East Butte Mining Company," allegation that plaintiff had demanded shares was held under circumstances to have been supported by evidence that he had demanded shares in corporation named "East Butte Copper Mining Company," which sometimes was called "East Butte Mining Company," so that there was no variance between the declaration and proof, see PRACTICE, CIVIL, 1.

Provision in contract of carriage by express company limiting extent to which it could be held liable for injury to goods or animals in transportation becomes of no effect when carrier makes material departure from method of transportation, so that shipper becomes entitled to recover full compensation for any loss sustained by him through carrier's breach of contract, see CARRIER, 1, 2.

Damages.

See DAMAGES, 1; BOND, 7, 8.

In Writing.

Instrument held to be non-negotiable promissory note which maker could not show was intended only for memorandum, see BILLS AND NOTES, 1.

Contract in writing between general contractor and plumber and piper, which was held plain and not subject to being varied by evidence of custom contrary to its terms, see EVIDENCE, 5.

Mere ignorance of contents of contract in writing which old foreigner was led to sign through deception practised upon him by his son was held not

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to be sufficient to avoid contract where other party did not participate in fraud, see *ante*, 2.

Novation.

At trial of action upon bond of contractor to town, conditioned upon performance of contract which was not assignable by contractor except with assent in writing of sewer commissioners of town indorsed thereon, where it appeared that contractor had assigned contract and assignee had performed some of work, but that no assent in writing had been given, evidence, tending to show that board of sewer commissioners knew and did not object to contract being performed by person other than contractor named therein, was held under circumstances not to be evidence that town assented to assignment of contract or waived contract's provisions, or of novation accepting assignee in place of contractor, see PRACTICE, CIVIL, 4.

Building Contract.

Action by town against surety on bond by contractor for certain construction work in sewer department of town, see PRACTICE, CIVIL, 4; SURETY, 1, 2.

Construction of certain building contract, where it was held that architect was constituted arbitrator to determine certain questions, that, so long as he acted honestly and with reasonable efficiency, his action was binding on parties, and that under circumstances of case judge who heard case without jury was warranted in holding that certain action of architect was binding on parties, see *ante*, 5, 6, 8.

Implied.

In law.

10. Where a treasurer of a city, by means of a promissory note, which purported to be signed by him in behalf of the city, but which was invalid on its face, procures from one innocent of his fraud a check for a sum of money, deposits the check to the account of the city and immediately draws out the entire amount so deposited to pay another note fraudulently issued by him and to cover defalcations by him, the city is not liable in an action for money had and received by the signer of the check. *Brown* v. *Newburyport*, 259.

Provision in contract of carriage by express company limiting extent to which it could be held liable for injury to goods or animals in transportation becomes of no effect when carrier makes material departure from method of transportation, so that shipper becomes entitled to recover full compensation for any loss sustained by him through carrier's breach of contract. Whether such recovery should be in tort for conversion or on implied contract arising from fact of shipment was not decided, see CARRIER, 1, 2.

In fact.

11. A business corporation may be bound by a contract, which can be inferred from its corporate acts and other facts without any direct evidence of the existence or terms of the contract. *North Anson Lumber Co.* v. *Smith*, 333.

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12. The fact, that a corporation has a by-law to the effect that no agreements involving the payment of a certain amount of money shall be valid without a vote of the board of directors, does not prevent the corporation from being held liable on a contract to pay a larger amount of money than that named in the by-law which, by inference from corporate acts, may be shown to have been made, and which may be presumed to have been made under adequate authority. *North Anson Lumber Co.* v. *Smith*, 333.

13. In an action by a corporation against an administrator, on certain promissory notes made by the defendant's intestate, it appeared that the intestate at the time he signed the notes was the president and a stockholder of the plaintiff, that the notes were payable to the owner of certain property which was received and used by the plaintiff and not by the defendant's intestate, who received no consideration for the notes unless it was an agreement of the plaintiff to hold him harmless from liability upon them, that the notes after maturity were indorsed in blank without recourse and were delivered to the plaintiff, whereupon the plaintiff, which was not a party to them and had not guaranteed their payment, paid the notes and entered the transaction on its books as "notes paid." *Held*, that from the evidence a contract of the plaintiff with the intestate to assume the payment of the notes could be inferred, that the conduct of the plaintiff through its officers was susceptible of the construction that the plaintiff in paying the notes was paying its own debt, which thereby became extinguished, and that the indorsement was a mere form which did not transfer an outstanding obligation, so that the case was for the jury and a verdict properly could not be ordered for the plaintiff. *Ibid.*

Limiting Liability.

Provision in contract of carriage by express company limiting extent to which it could be held liable for injury to goods or animals in transportation becomes of no effect when carrier makes material departure from method of transportation, so that shipper becomes entitled to recover full compensation for any loss sustained by him through carrier's breach of contract, see CARRIER, 1, 2.

Assignment.

At trial of action upon bond given by contractor to town, conditioned upon performance of contract which was not assignable by contractor except with assent in writing of sewer commissioners of town indorsed thereon, where it appeared that contractor had attempted to assign contract and assignee had performed some of work, but that no assent in writing to assignment had been given, evidence tending to show that board of sewer commissioners knew and did not object to contract being performed by person other than contractor named therein was held under circumstances not to be evidence that town assented to assignment of contract or waived contract's provisions, or of novation accepting assignee in place of contractor, see PRACTICE, CIVIL, 4.

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CONVERSION.

1. At the trial before a judge without a jury of an action, by the customer of a New York firm of stockbrokers against a Boston firm who did business for the New York firm under a contract with them, for conversion of shares of capital stock, a finding of the following facts was warranted from facts agreed upon: The customer on August 19 of a certain year ordered the New York firm to subscribe for the shares, the market for which was in Boston. The New York firm placed the order with the Boston firm and the Boston firm made the subscription for $4,000, paid for the shares in full and charged that amount to the New York firm, and the New York firm, receiving notice of the transaction, balanced their account with their customer by sending him a check for an amount which, with the stock thus subscribed for, was found to be due to him. The New York firm then demanded of the Boston firm that the shares of stock be transferred to their customer. The Boston firm, upon paying for the shares, had received temporary receipts, which later were to be surrendered and exchanged for stock certificates, but such exchange could not be made until September 8. By a custom of brokers, no charge was made for making such exchange. There were two accounts kept between the firms, one of dealings in Boston by the Boston firm for the New York firm and the other of dealings in New York by the New York firm for the Boston firm, and the accounts and the transactions referred to in them were intended to be dealt with independently, the two accounts to be considered together at the close of the transactions between the firms. On August 19 and immediately before and after that date, there was a substantial balance due to the New York firm on the account of the Boston firm's transactions for them. On the account as to the New York firm's transactions for the Boston firm, the New York firm had in their hands a large amount of property of the Boston firm as margins on New York stock transactions. On August 20 the New York firm paid the Boston firm $5,000 on account, which was understood to cover the transactions for the plaintiff. A few days later the New York firm failed and the Boston firm then sold the stock, which had been subscribed for on the plaintiff's behalf, and applied the proceeds toward what was due to them from the New York firm. *Held*, that there was evidence warranting a finding for the plaintiff, because findings were warranted that the defendants sold shares of stock which were fully paid for and belonged to the plaintiff, although there had been no formal transfer thereof to him and regular certificates could not be issued until later. *Parnall* v. *Paine*, 181.

Proper remedy in case there is apprehension lest executor of will or administrator of estate with will annexed shall convert property of estate while question as to propriety of certain transfers of property by executor to himself is pending in Probate Court where executor's accounts are being passed upon, is not by action at law, but is by bill in equity, see EXECUTOR AND ADMINISTRATOR, 2.

Provision in contract of carriage by express company limiting extent to

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Conversion (*continued*).

which it could be held liable for injury to goods or animals in transportation becomes of no effect when carrier makes material departure from method of transportation, so that shipper becomes entitled to recover full compensation for any loss sustained by him through carrier's breach of contract. Whether such recovery should be in tort for conversion or on implied contract arising from fact of shipment, was not decided, see CARRIER, 1, 2.

CORPORATION.

Officers and Agents.

1. The president and the treasurer of a charitable corporation have no power, without special authority, to make a promissory note in the name and behalf of the corporation. *Peoples National Bank* v. *New England Home for Deaf Mutes, etc.*, 48.

Suit in equity by shareholders in corporation against corporation and directors to restrain alleged unlawful acts of officers must contain allegation that it is brought by plaintiffs on behalf of themselves and all other shareholders of corporation who are not plaintiffs or defendants and who may join therein, see EQUITY JURISDICTION, 14.

Promissory note, given in purchase of land by charitable corporation and purporting to be made by corporation, which was held not to bind corporation because neither from by-laws nor from any other source did officers who executed it have power to do so, and because, although corporation had entered into possession of land and retained it, such acts under circumstances could not be held to be ratification of acts of officers, see BILLS AND NOTES, 6; *ante*, 1.

By-laws.

Promissory note, given in purchase of land by charitable corporation and purporting to be made by corporation, which was held not to bind corporation because neither from by-laws nor from any other source did officers who executed it have power to do so, and because, although corporation had entered into possession of land and retained it, such acts under circumstances could not be held to be ratification of acts of officers, see BILLS AND NOTES, 6; *ante*, 1.

Powers.

2. A business corporation has power to agree to reimburse the maker of a note which he is to sign for its benefit. *North Anson Lumber Co.* v. *Smith*, 333.

And such contract is enforceable although there is no direct evidence that it was made in accordance with corporation's by-laws, compliance with by-laws being presumed, see CONTRACT, 11–13.

Rights of Shareholders.

Suit in equity by shareholders in corporation against corporation and directors to restrain alleged unlawful acts of officers must contain allegation

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that it is brought by plaintiffs on behalf of themselves and all other shareholders of corporation who are not plaintiffs or defendants and who may join therein, see EQUITY JURISDICTION, 14.

Liability of Shareholders.

3. A statute of another State, providing for the incorporation of associations "organized for the purpose of constructing railways, maintaining and operating the same," contained the following provision: "Each stockholder of any corporation formed under the provisions of this act shall be held individually liable to the creditors of such corporation to an amount not exceeding the amount unpaid on the stock held by him, for any and all debts and liabilities of such corporation, until the whole amount of the capital stock of such corporation so held by him shall have been paid." *Held*, that one, who voluntarily became an original stockholder in such a corporation and did not pay for his shares, was liable to a creditor of the corporation, in an action of contract brought in this Commonwealth, on proof of those facts and of the debt of the corporation to the plaintiff, although the plaintiff had obtained no judgment against the corporation, the liability being made direct by the statute and not enforceable through the corporation. *American Spirits Manuf. Co.* v. *Eldridge*, 590.

4. In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply equitable assets in the hands of divers defendants alleged to be held for the benefit of the principal defendant, it appeared that the debt from the principal defendant consisted of his liability under a statute of another State as a stockholder of a corporation organized in that State to the plaintiff as a creditor of such corporation, and that the language of the statute made the principal defendant directly liable to the plaintiff on proof that the plaintiff was such a creditor of the corporation and that the principal defendant was a stockholder who had not paid for his shares, without showing that any judgment had been obtained against the corporation. *Held*, that neither the corporation nor other delinquent stockholders were necessary parties to the suit, and that there was no occasion for the appointment of a receiver to wind up the affairs of the corporation and distribute its assets, so that the plaintiff could have recovered from the principal defendant in an action of contract, had not the reaching and application of equitable assets given ground for equitable relief. *Ibid.*

Relation of Corporation to Partnership which it succeeds.

Liability in equity of corporation for certain results of fraud of partnership which it succeeds, and rights of corporation against fraudulent partners in same suit, see EQUITY JURISDICTION, 29; EQUITY PLEADING AND PRACTICE, 6, 7; FRAUDS, STATUTE OF, 2.

Criminal Liability of Corporation for Misdemeanor.

5. Corporations engaged in the business of selling milk are included in the word "whoever" as it is used in R. L. c. 56, § 55, which provides that "Whoever, himself or by his servant or agent, or as the servant or

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agent of another person, sells, exchanges or delivers, or has in his custody or possession with intent to sell, exchange or deliver or exposes or offers for sale or exchange, adulterated milk or milk to which water or any foreign substance has been added, or milk" of various other descriptions "shall for a first offence be punished by a fine of not less than fifty nor more than two hundred dollars, for a second offence by a fine of not less than one hundred nor more than three hundred dollars and for a subsequent offence by a fine of fifty dollars and by imprisonment for not less than sixty nor more than ninety days." *Commonwealth* v. *Graustein & Co.* 38.

Dissolution.

6. In St. 1907, c. 290, dissolving by § 1 a large number of corporations there enumerated, subject to the provisions of St. 1908, c. 437, §§ 52, 53, and providing in § 2 that "nothing in this act shall be construed to affect any suit now pending by or against any corporation mentioned in the first section of this act," the word "suit" includes an action at law, and the word "pending" includes an action in which the writ is dated four days before the statute took effect, although it was not served on the defendant until five days after the statute took effect. *Worcester Color Co.* v. *Henry Wood's Sons Co.* 105.

Reorganization.

Reorganization of corporation after shareholder had made will disposing of shares therein and before his death, which did not effect ademption of bequest, see DEVISE AND LEGACY, 7.

Municipal Corporations.

See that title.

COVENANT.

Remedy of purchaser at sale of real estate for collection of taxes, in case there is defect in sale, is not by action of contract against collector of taxes upon warranty in tax deed, but is to comply strictly with provisions of R. L. c. 13, § 44, see TAX, 22.

Suit in equity, which could not be maintained for specific performance of alleged oral promise to assign lease because such assignment would violate covenant of lease and to compel it would be nugatory and inequitable, also was held not to be maintainable to cause defendant to be declared to be holding lease in trust for plaintiff, see EQUITY JURISDICTION, 11, 12.

CRAIGIE BRIDGE.

Powers of commissioners to apportion expenses of Metropolitan Parks District in regard to apportionment of expenses of Charles River basin and removal of Craigie Bridge, finality of their determinations, extent of their discretion and propriety of certain of their awards, see COMMISSIONERS TO APPORTION EXPENSES OF METROPOLITAN PARKS DISTRICT, 1–3.

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CUSTOM.

Contract in writing between general contractor and plumber and piper, which was held plain and not subject to being varied by evidence of custom contrary to its terms, see EVIDENCE, 5.

DAMAGES.

In Action of Contract.

1. In an action for the alleged breach of a contract in writing, by which the plaintiff, who was the exclusive agent of the manufacturer for the sale in New England of a certain kind of automobile and was authorized to establish sub-agencies, agreed with the defendant to sell him these automobiles at a discount of ten per cent, and the defendant agreed to devote his entire time between January 1 and September 30, 1906, to selling these automobiles and to have no business with the manufacturer except through the plaintiff, where damages were claimed on the ground that they were caused by the failure of the defendant to devote all his time to the sale of the automobiles during the whole of the specified period, and there was no evidence as to prospective customers but there was evidence showing an inability or indisposition on the part of the manufacturer to fill orders promptly, the question whether, in view of the newness of the venture and of its dependence upon the temperament, energy and perseverance of the defendant and the performance by the plaintiff of his contract with the manufacturer, the assessment of any damages would not be too speculative to be allowed, here was referred to as one which it was not necessary to determine. *Bangs* v. *Farr*, 339.

Damages for breach of bond of certain city treasurer and collector of taxes, see BOND, 7, 8.

For Property taken or injured by Statutory Authority.

2. Review by LORING, J., of the decisions of this court and the statutes relating to the awarding of damages for the taking of land or interests therein by an act of eminent domain, where at the time of such act several persons have several estates or interests in the property taken or damaged. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 298.

3. In a petition by a manufacturing corporation, which carried on its operations in buildings which it had erected and occupied with fixed machinery upon land which it held under lease, for damages suffered by it from acts of eminent domain of a railroad corporation in the abolition of a grade crossing, the lessor was ordered to file an intervening petition for such damages as he had suffered, and this court *held*, that, upon the filing of such an intervening petition and the trial together of the petition and the intervening petition, the jury must determine first and set forth in their verdict the entire damage done to the real estate leased, including as part thereof the buildings and the fixed machinery put in them by the lessee, that the amount of such entire damage then must be apportioned between the lessor and the

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Damages (*continued*).

lessee, and, if the lessee had suffered any special damage during the acts of abolition of the crossing, or if his damage in the matter of access to his manufactory was different from that of the lessor, that the amounts of such damage should be found and set forth in the verdict specially in addition to the sums previously mentioned; and that, as to the lessor's entire share of the damage to the real estate, there should be a separation of so much thereof as represents his share of the damage done to the buildings and fixed machinery from what represents his share of the damage done to the land, in order that the lessee may exercise his right of removing trade fixtures, which right, after the acts of eminent domain, covers the buildings and fixed machinery and the damage done to them, including the lessor's share of that damage. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 298.

4. At the trial of a petition against a railroad corporation for the assessment of damages caused to the petitioner by acts of eminent domain of the respondent in the abolition of a grade crossing of the railroad with a private way, which acts resulted in the extinguishment of another private way, which formerly had been the only means of access to the petitioner's land upon which he had a manufacturing establishment, and in the erecting of a high embankment along the side of the manufactory, the trial judge admitted evidence offered by the respondent and tending to show that at a comparatively small expense a way from the petitioner's land could have been constructed connecting the land with a new street, which had been constructed as part of the acts in abolition of the crossing, and that the value of the land covered by such new way would have been small. In his charge the judge instructed the jury that, although he could not say that the petitioner was bound or was not bound to attempt to procure such a way, yet if the jury were satisfied that the possibility of his doing so would have affected the market value of the land after the extinguishment of the private way, they could take that into account. *Held*, that, as guarded by the instructions to the jury, the evidence properly was admitted. *Ibid.*

5. The decision in Cornell-Andrews Smelting Co. *v.* Boston & Providence Railroad, 202 Mass. 585, that, in assessing damages suffered by a lessee of real estate by the abolition of a grade crossing of a railroad with a way, a provision in the lease giving to the lessee a right at any time during its term of ten years to purchase the premises leased at their fair value should not be taken into consideration either to enhance or to diminish the lessee's claim, affirmed. *Ibid.*

6. Upon a review of the record of a former trial, with petitions by the lessor, of this petition by a lessee of real estate to recover damages due to the abolition of a grade crossing of the defendant railroad corporation with a private way and the consequent extinguishment of another private way which had furnished the only means of access to a factory containing fixed machinery, erected upon the leased land by the petitioner, and of the opinion of this court, reported in Cornell-Andrews Smelting Co. *v.* Boston & Providence Railroad, 202 Mass. 585, stating their decision sustaining exceptions taken by the respondent at that trial, it was *held*, that the lessor's share of the damage done to the buildings and fixed machinery must be

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taken to have been included in verdicts rendered on the lessor's petitions, which had not been set aside, and that the lessee did not have any right to proceed at a subsequent trial of his petition on the basis that such damages belonged wholly to him and were to be recovered under his petition. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 298.

Various rulings as to proceedings in such case, see PRACTICE, CIVIL, 19–22.

Owner of land was held under circumstances to be unable to maintain suit in equity against railroad corporation to enjoin it from constructing conduit in such way as to diminish flow of certain creek, act complained of being merely public nuisance, see EQUITY JURISDICTION, 30.

Nor, if injury in question is done in abolition of grade crossing under decree of court, has he any standing in equity for damages or to enforce decree, see GRADE CROSSING, 1.

Contract limiting Extent of Liability.

Provision in contract of carriage by express company limiting extent to which it could be held liable for injury to goods or animals in transportation becomes of no effect when carrier makes material departure from method of transportation, so that shipper becomes entitled to recover full compensation for any loss sustained through carrier's breach of contract, see CARRIER, 1, 2.

Case determining that liability of carrier for loss of baggage of passenger is not limited by stipulation printed in schedule of rates, fares and charges filed with interstate commerce commission, in absence of knowledge thereof by passenger, see CARRIER, 4, 6.

DEATH.

Actions for, see NEGLIGENCE, 12, 13, 15, 25, 31, 33, 40.

Survival of action after death, see SURVIVAL OF ACTIONS, 1–3.

DECEIT.

Bill in equity against several defendants to relieve plaintiff from results of fraud and deceit alleged to have been practised upon him by one of defendants and to have been conspired in by all of them, see EQUITY JURISDICTION, 17, 18.

DECREE.

Principles which govern determination of question, whether decree of court of another State for payment of alimony in divorce proceedings is final so that it may be subject of action of contract here, application thereof, and evidence to prove such decree, see JUDGMENT, 1–3; EVIDENCE, 9.

DEED.

Executor of will has no power to ratify deed of testator made when he was of unsound mind or under undue influence, see EQUITY JURISDICTION, 21.

Construction of certain deed of city of Boston containing agreement as to payment of certain betterments, see TAX, 6.

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Deed (*continued*).

Title founded on deed procured through fraud will not be registered by Land Court, see FRAUD, 1.

Fact, that seven years after making deed grantor made will which after his death was allowed, is not conclusive evidence on issues in suit in equity to set aside deed because it was procured by undue influence or fraud or was made while grantor was of unsound mind, see EQUITY JURISDICTION, 22.

Person who enters into contract to purchase land not knowing that land is subject to unrecorded lease exceeding seven years, who before consummation of purchase learns of lease but completes purchase nevertheless, is not in position of purchaser of land for value without notice of lease, but takes land subject to it, and cannot compel lessee who sues to establish his rights to reimburse him to any extent, see EQUITY JURISDICTION, 23, 24.

Maintenance upon certain land of automobile garage was held not to be prohibited by restriction in deed against maintenance of stable, but to be prohibited by restriction against maintenance on land of any building except "usual outbuildings appurtenant" to dwelling house of certain class, see EQUITABLE RESTRICTIONS, 2, 3, 5, 7.

Remedy of purchaser at sale of real estate for collection of taxes, in case there is defect in sale, is not by action of contract against collector of taxes upon warranty in tax deed, but is to comply strictly with provisions of R. L. c. 13, § 44, see TAX, 22.

Tax deeds, see TAX, 25–34.

DEVISE AND LEGACY.

Intention not expressed in Terms.

1. Upon a bill for instructions by a trustee under a will, if it appears that, by the literal terms of the will, property devised in trust is left undisposed of in an event which has happened, but from a reading of the whole will it appears that the testator's intention was that the property in such event should go to the issue of his children, the trustee will be instructed to carry out the intention of the testator as expressed in the whole will. *Sanger* v. *Bourke*, 481.

2. A testator by his will gave the residue of his estate to a trustee with instructions to pay the income to his nine children, naming them, to be equally divided among them, and "in case of the decease of either of my said children without children or lawful issue, I then will that the income and interest so given as aforesaid shall in like manner be divided among the survivors, but in case my said children die leaving issue, then the capital of such deceased child's share shall be equally divided among such issue share and share alike, to their heirs and assigns forever." The last of the children died without issue. The trustees, under instructions from this court given in Cook *v.* Smith, 101 Mass. 341, had paid to the issue of each of the other children, as such children died, the fractional part of the fund of which their representative parents had received the income. In a suit in equity seeking instructions as to whether that portion of the principal which was left after the death without issue of the survivor of the children

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should be distributed as intestate property or should be divided among the issue of the deceased children, it was *held*, that the plain intention of the testator was to dispose of his whole estate, and, in the contingency which had happened, that the remaining principal should be divided in equal shares among his grandchildren and among the issue of any deceased grandchildren by right of representation. *Sanger* v. *Bourke*, 481.

In such case, conveyance by trustee of real estate included in trust is necessary to vest title in ultimate beneficiaries, see TRUST, 13.

Designation of Legatee.

3. A legacy was given to the "Fresh Air Fund now under the charge of W." It appeared that W. was in charge of a department of the City Missionary Society of Boston called the "Fresh Air Fund." *Held*, that the legacy should be paid to the City Missionary Society of Boston to be used in the department designated. *Pope* v. *Hinckley*, 323.

4. A legacy given to "the Library Fund of the Massachusetts Commandery of the Military Order of the Loyal Legion of the United States" was held to be payable to "the Commandery of Massachusetts, Military Order of the Loyal Legion of the United States," to be used and applied for library purposes. *Ibid.*

Determination of Beneficiaries.

5. The will of an unmarried woman contained the following provision: "Upon the death of both my said brothers, and the said J. [one of the brothers] leaving no issue then living, I give, devise and bequeath all the then remaining trust property and estate, with any accumulations, in three equal portions, one portion to be divided equally between my cousins, J. M. and S., children of my uncle, W.; one portion to be divided equally between my cousins, H. and G., children of my aunt, Caroline, and one portion to my uncle, the said T., to them, their heirs and assigns respectively forever. In case of the previous decease of either of my said cousins or of my uncle, T., leaving issue then living, I direct that the share of such deceased cousin, or of my said deceased uncle, be paid over in equal portions by right of representation to such issue. If there be no such issue then living such share shall be divided equally among the survivors of my said cousins and said uncle, or the whole to be paid over to the survivor of them." One of the brothers died before the testatrix, leaving no issue. The other brother enjoyed the income of the trust fund for twenty years and then died, leaving no issue. During the lifetime of this brother the testatrix's cousin H. died, leaving no issue, and about a month later the testatrix's uncle T. died, leaving issue. Upon a bill by the trustee for instructions, it was agreed that the issue of the deceased uncle took his share, and the question was whether under the last sentence of the paragraph quoted the issue of the uncle could share in the deceased cousin's share. *Held*, that in the phrase "In case of the previous decease of either of my said cousins" the word "previous" meant previous to the time of distribution at the death of the survivor of the testatrix's two brothers, and that in the later clause, "If there be no such issue then liv-

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ing such share shall be divided equally among the survivors of my said cousins and said uncle" the words "then living" and "survivors" referred also to the time of distribution, and that, as the uncle was not at that time a survivor, his issue must be excluded in the distribution. *Hall* v. *Hall*, 350.

Inadvertent Use of Word "Trustees."

6. A direction by a testator in his will that certain legacies, together with all other bequests in his will, shall "be paid within three years from the probating of this will at the discretion of the trustees" is a direction to the executors of the will, the word "trustees" manifestly being used inadvertently, and is a direction that the legacies are to be paid in three years from the probate of the will or sooner at the discretion of the executors. *Pope* v. *Hinckley*, 328.

Ademption.

7. A testator by his will gave numerous legacies of shares of the first preferred stock of a certain corporation. About a year later he executed a codicil, which did not change this part of his will, and three years after that he died. At the date of his will he was the holder of a very large number of shares of the first preferred stock of the corporation and at the date of the codicil this number had been increased. The corporation was organized under the laws of New Jersey. About a year after the execution of the codicil and about two years before the testator's death the corporation passed into the hands of a receiver in New Jersey. In the interest of the testator and such other stockholders as chose to come in for the purpose of acquiring the assets and succeeding to the business of the New Jersey corporation, a new corporation was organized under the laws of Connecticut, to which, after payment by the receiver of all the obligations of the New Jersey corporation and the expenses of the receivership, the remaining assets were conveyed by the receiver about nine months before the testator's death under an order of the New Jersey court, and about a month later a decree was made which dissolved the New Jersey corporation and under a statute of that State declared its charter to be forfeited and void. The testator and other stockholders of the New Jersey corporation deposited their stock with a certain trust company, which issued to them negotiable voting trust certificates, which were to be exchanged for stock in the new corporation in accordance with a stated ratio. The exchange was not effected during the testator's lifetime, but was made by his executors shortly after his death pursuant to the prearranged scheme. Seven days before the testator's death a decree was entered by the New Jersey court that there should be paid to persons, who had not deposited or should not deposit their first preferred stock in the New Jersey corporation but had elected to take cash therefor, a dividend of a certain amount of money on each share of the first preferred stock. On the day of the death of the testator, an order was entered discharging the receiver from any further duty or responsibility and terminating the receivership. *Held*, that the legacies of shares of the first preferred stock of the New Jersey corporation were not adeemed by what took place before the death of the

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testator, and that they took effect subject to such engagements as the testator had entered into in regard to the reorganization of the corporation and the surrender and exchange of the stock bequeathed, because, although the New Jersey corporation had been dissolved, the testator at the time of his death still held the shares of stock in the defunct corporation, which gave him corresponding rights to stock in the new corporation; and therefore that the legacies were to be satisfied by the transfer to the legatees of the number of shares of the stock in the Connecticut corporation to which the testator would have been entitled by virtue of the number of shares of the first preferred stock in the New Jersey corporation respectively named in such legacies, it being immaterial and unnecessary to decide whether the legacies were to be regarded as general or specific. *Pope* v. *Hinckley*, 323.

Lapsed Legacy.

8. A legacy to a certain charity, called a mission, with a provision that it "is not to take effect unless" a person named "be alive and have charge of said mission at the time of" the testator's death, lapses if the person named has died during the testator's lifetime. *Pope* v. *Hinckley*, 323.

Trust.

Construction of certain trust provisions in will, see TRUST, 1, 2.

Certain testator by his will devised and bequeathed entire residue to executor "to have and to hold . . . without the intervention of any trustee" during his life, and provided that on executor's decease "whatever may then be remaining" of the residue should be given to certain town. After death of executor account was filed in his behalf stating that he had paid residue over to himself, which was held proper under terms of will without intervention of trustee and order of distribution, see EXECUTOR AND ADMINISTRATOR, 1.

Validity of Codicil.

Attestation of codicil of will by one interested under provision in codicil and also under provision of will was held to make provision in codicil as to that person void, but not to affect provision in will, which that witness did not attest, see WILL, 1.

Taxation.

Taxation on successions and inheritances, see TAX, 7–16.

DISBARMENT.

See ATTORNEY AT LAW, 1–4.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

Rights of wife in estate of husband who died testate, where she does not waive provisions of will, see HUSBAND AND WIFE, 1.

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DYNAMITE.

Statement of principles of law relating to burden of proof in actions for personal injuries caused by negligence where plaintiff relies on circumstantial evidence, and application of them in action against street railway company for personal injuries caused by explosion of box of dynamite into which street car ran on public way, it being held that determination of responsibility for accident was left by evidence too much to conjecture, see EVIDENCE, 3; NEGLIGENCE, 20.

EASEMENT.

Of right of way gained by prescription, see WAY, 1–8.

Chapters 188 and 345 of St. 1871, which gave Winnisimmet Company, corporation maintaining ferry between Boston and Chelsea, right to take certain property by eminent domain, also gave it right to take all easements appurtenant thereto, see EMINENT DOMAIN, 2.

ELECTRICITY.

Negligence in use of, see NEGLIGENCE, 40.

EMINENT DOMAIN.

1. While it is a general rule that, where an interest in land is taken by right of eminent domain for a purpose not inconsistent with a general right of property in the owner, the interest taken is not a fee but only an easement, nevertheless the question is always one of construction of the statute authorizing the taking, and it is not necessary that the power to take and hold the land in fee should be stated in any set terms, any language in the statute which makes that meaning clear being sufficient. *Winnisimmet Co.* v. *Grueby*, 1.
2. Under all the circumstances attending their enactment, chapters 188 and 345 of St. 1871, which authorized the Winnisimmet Company, a corporation organized under a special charter, St. 1833, c. 197, for the purposes of maintaining a ferry between Boston and Chelsea, to purchase or otherwise take for the purpose of widening its ferry slip certain property described accurately in the statute "with all the rights, privileges, appurtenances and easements to . . . said estate belonging," and provided that nothing therein contained should "give said ferry company any right to enter upon, or deal with anything less than the whole of the parcel of land" therein "described or intended," and also provided that the act should be void unless the land should be purchased and paid for, or otherwise taken and notice of such taking given in writing to the owner of the land or his representatives within six months from its passage, gave that corporation the right to take by eminent domain a fee in the whole land described with all its easements and appurtenances. *Ibid.*
3. Where, under a provision of a certain lease of land, the lessee is given an option at any time during the term of the lease to buy from the lessor the

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fee in the land, and during the term the land is taken by an act of eminent domain by a railroad corporation in the abolition of a grade crossing, although at the trial of a petition by the lessee for the assessment of his damages the provision in the lease regarding the option cannot be considered, nevertheless *it seems* that he is not remediless, because, while he no longer at his election can buy the land, he can at his election buy the fund into which in equity the land has been converted by the exercise of the power of eminent domain. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 298.

EMPLOYER'S LIABILITY.

See NEGLIGENCE, 4–19; LABOR, 1–8; JOINT TORTFEASOR, 1; WORKMEN'S COMPENSATION ACT, 1–6.

EMPLOYERS' LIABILITY ACTS.

Opinion of Justices as to constitutionality of Workmen's Compensation Act, now St. 1911, c. 751, see WORKMEN'S COMPENSATION ACT, 1–6.

Certain notice to employer by attorney for employee was held not to satisfy requirements of R. L. c. 106, § 75, now St. 1909, c. 514, § 132, see NEGLIGENCE, 6.

EQUITABLE RESTRICTIONS.

Construction.

1. Provisions in a deed of one of several lots of land all included in a parcel owned by one person, which impose upon the land conveyed, for the benefit of the grantor and of those from time to time owning other lots in the parcel, restrictions as to the character of buildings to be placed thereon, must be interpreted in the light of the circumstances as they existed when the deed was made. *Riverbank Improvement Co.* v. *Bancroft*, 217.
2. The owner in 1890 of a large parcel of land at a distance from the business section of Boston in the Back Bay district, so called, subdivided it into twenty-eight lots and, with the intention of making the territory a fine residential district, in selling and conveying the lots to purchasers made uniform deeds containing restrictions limiting the use of the lots to dwelling houses for the occupancy of one family, which were to be built of brick, stone or iron, and within certain parts of the lots, and the following restriction: "No stable of any kind, private or otherwise, shall be erected or maintained on any portion of said land." In 1899 one of such lots was conveyed by a deed containing such restrictions, imposed for the benefit of owners of the other lots in the parcel, to a person who built and maintained thereon a garage. *Held*, that, interpreting the word "stable" in the light of the circumstances existing at the time when the restriction was imposed, the maintenance of the garage was not a violation of the restriction against the maintenance of a stable. *Ibid.*
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4. A restriction, imposed by the owner of a number of lots in a tract of land on a certain street in furtherance of a general scheme for the benefit of them all, that no building "shall ever be erected within fifteen feet of" the line of the street "and no mechanical shop, livery stable, or store shall ever be erected or used on said parcel which shall be detrimental to the use of this locality for dwelling houses," does not prevent as matter of law the erection upon one of the lots of a building which is not a dwelling house and which is used as a place of storage of merchandise not brought to or taken from the building over the street in question, and also for the storage of automobiles, but not as a garage. *Noyes* v. *Cushing*, 123.

Validity.

5. Restrictions, contained in deeds in 1899 and previous thereto, of lots of land in a parcel situated at a distance from the business section of a city, which were intended to maintain the territory as a fine residential district, and which therefore prohibited the maintenance on any of the lots of a garage, are not an unreasonable hindrance to the use of the land and are not against public policy. *Riverbank Improvement Co.* v. *Bancroft*, 217.

Who may enforce.

6. Where a corporation, which owned a large parcel of land, subdivided it into twenty-eight lots, which were sold to various persons, the deeds of conveyance containing certain uniform valid restrictions as to the use of the lots stated therein to have been imposed for "the benefit of the grantor and of the owner or owners from time to time of all" of the lots, the corporation, even after it no longer owns any land in the parcel, and the owner of one of the lots properly can join as plaintiffs in a suit in equity to restrain the owner of another one of the lots from violating the restrictions. *Riverbank Improvement Co.* v. *Bancroft*, 217.

Decree enforcing.

7. The owner of one of twenty-eight lots of land included in a parcel, all of which were subject to a restriction imposed in 1899, which this court in-

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terpreted as preventing the building or maintaining thereon of a garage, brought a suit in equity to enjoin the owner of another lot from continuing with the erection upon his lot of a garage which he had begun to build. The erection and maintenance of "usual outbuildings appurtenant" to brick dwelling houses built for the occupancy of one family were permitted by the restrictions. The defendant, while the suit was pending, completed the garage and used it as such and also as "a place to keep vegetables, double windows, blinds, and other minor household things," uses for which it was intended when it was erected, and also as a place in which to freeze ice cream and "do other small household things," and during the summer to lock up "barrels and other things about the yard." The building itself was not a nuisance and did not obstruct the view from windows in other houses in the parcel. *Held*, that justice would be done by a decree simply compelling the defendant to cease to use the building as a garage or as a storehouse for an automobile, and ordering the removal of the building unless it be used for a purpose not inconsistent with the restrictions. *Riverbank Improvement Co.* v. *Bancroft*, 217.

8. At the hearing in the Superior Court of a suit in equity by the owner of a lot of land upon a certain street against the owner of an adjoining lot to enforce a restriction, applying to all the lots on the street, that no building "shall ever be erected within fifteen feet of" the line of the street "and no mechanical shop, livery stable, or store shall ever be erected or used on said parcel which shall be detrimental to the use of this locality for dwelling houses," the evidence was conflicting, and findings were warranted that the defendant was proposing to erect on his lot a building to be used in connection with a store maintained by him on an adjacent and parallel street. The presiding judge ordered a decree enjoining the defendant from using the proposed building as a store for the sale of goods on the street upon which it stood, but permitting him to use it for the storage of merchandise and as a "garage for the storage of automobiles or as a storage warehouse." On appeal by the plaintiff it was *held*, that the use of the building as a "garage for the storage of automobiles" would or might be detrimental to the use of the street for dwelling houses, and that the decree should be modified by striking out that part of it, the defendant being given leave to apply to the Superior Court to have the decree include a provision, if that court saw fit, permitting the use of the building for the storage of automobiles but not as a garage; and it was *further held* that the decree should be modified further by enjoining the defendant from using the building for the reception and delivery of goods to be sold in the store on the adjoining street, and from using the street on which the proposed building was to stand for the transportation of goods and merchandise in connection with such store. *Noyes* v. *Cushing*, 123.

EQUITY JURISDICTION.

Laches.

1. In a suit in equity by the selectmen of a town against a street railway corporation under St. 1906, c. 463, Part III. § 157, formerly R. L. c. 112,

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§ 100, to enforce a lawful condition in a grant of location from the plaintiffs to the predecessor of the defendant, which is binding on the defendant, requiring that the rate of fare shall not exceed the sum of five cents within the town and to certain termini, a delay before bringing the suit of nineteen months after the first violation of the terms of the grant by charging fares in excess of the limitation, during which period there were two further modifications in the schedule of fares and negotiations between the parties, does not constitute laches on the part of the plaintiffs, who are acting as public officers to enforce a public right. *Selectmen of Westwood* v. *Dedham & Franklin Street Railway*. 213.

Demurrer to certain bill in equity seeking to apply for satisfaction of debt trust fund created for that purpose, which was based on contention that on allegations of bill plaintiff was barred by statute of limitations or by laches, was overruled, see *post*, 3, 4.

Statute of Limitations.

2. In a suit in equity to charge with a debt due to the plaintiff from one group of defendants certain funds in which the other defendants are interested, if it appears from the allegations of the bill that an action at law by the plaintiff against the alleged debtors would be barred by the statute of limitations, but those defendants do not demur to the bill, demurrers of other parties on that ground will be overruled. *Coram* v. *Davis*, 229.

3. Where, from the allegations in a bill in equity, to enforce a claim of the plaintiff against the interests of certain persons in the estate of a decedent and against a fund to be paid from such estate to certain trustees, it appears that the bill was brought within four months after a decree of the Probate Court determining the rights of the defendants in the estate, a demurrer to the bill will not be sustained either on the ground that it is barred by the statute of limitations or by laches. *Ibid.*

4. If, from the allegations of a bill in equity, seeking to enforce a right of subrogation to the rights of one who had maintained a successful suit against the plaintiff, it appears that the bill was filed within fourteen months after the final decree in the suit against the plaintiff, the bill is not demurrable, either on the ground that it is barred by the statute of limitations or that it is barred by laches of the plaintiff. *Ibid.*

5. Where a bill in equity respecting a claim which arose in another State does not contain allegations as to the law of that State regarding the limitation of actions, a demurrer on the ground that the cause of action was barred by the statute of limitations of that State cannot be sustained, since the law of such State is a fact in a suit here and no allegation as to it appears in the bill. *Ibid.*

Plaintiff must have "Clean Hands."

Application of such doctrine in suit by beneficiaries of trust against trustee for accounting, see TRUST, 9, 10.

Improper advertising methods of plaintiff in suit to restrain unfair competition, which were held under circumstances not to make it inequitable to give plaintiff relief, see UNFAIR COMPETITION, 4.

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Res judicata.

6. A person, who was not a party to a suit in equity, can be found to have been a privy, so as to be bound by the decree, if he was beneficially interested in the subject matter of the suit and caused it to be brought in part for his benefit, directing and controlling its prosecution and bearing the expense. *Weld* v. *Clarke*, 9.

7. At the trial of a writ of entry to recover the possession of certain land, it appeared that the title of the demandant's grantor, which depended upon the validity of a tax deed, had been established by a decree in a suit in equity brought against such grantor by the holder of a mortgage on the land. The tenant contended that he was not bound by the decree because he was not a party to the suit in equity. It appeared that when the suit in equity was brought the tenant had a beneficial interest in the equity of redemption of the land and caused that suit to be instituted in the name of the holder of the mortgage for the joint benefit of such holder and himself, that he acted as counsel for the plaintiff, paid the costs and gave his professional services, retaining his beneficial interest in the equity of redemption although not a party to the suit. *Held*, that the tenant was bound by the decree and was precluded from contesting the validity of the tax deed, so that the demandant was entitled to judgment. *Ibid.*

8. While a final decree of a court having jurisdiction of the subject matter of the settlement of the estate of a decedent, determining the parties to whom and the proportions in which the estate shall be divided if a division is made, conclusively determines those matters, a suit in equity may be maintained against the administrator and certain persons named in the order as to distribution to compel the defendants to recognize the validity of an equitable charge upon such of the funds in the hands of the administrator as are due under the decree to the other defendants. *Coram* v. *Davis*, 229.

For an Accounting.

In suit in equity by beneficiary under express trust against trustee for accounting, burden is upon defendant to show that in discharge of duties he has exercised skill, prudence and judgment, see TRUST, 5.

Suit by beneficiaries of trust against trustees for accounting, involving justifiability of certain payments made by defendants and of their conduct in letting property be sold at sale in foreclosure of mortgage, see TRUST, 3, 5–8, 11, 12.

Suit in equity for accounting, brought by owner of machinery against partnership, who under contract of agency had agreed to sell machinery for plaintiff and had defrauded him, and also against corporation to which partnership assets had been transferred, where there was crossbill by corporation against defrauding partners, see *ante*, 15, 16, 29; EQUITY PLEADING AND PRACTICE, 6, 7; FRAUDS, STATUTE OF, 2.

Bill for Instructions.

9. In a suit in equity by the trustees under a will the plaintiffs asked for instructions as to whether, in payments to beneficiaries under the will to

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whom gifts of annual income were made, when there had been *pro rata* abatements on account of deficiency of income, the trustee should make up such deficiency in income occurring in one year from a surplus occurring in a subsequent year, and for further instructions as to the disposition of excess of income under the directions contained in the will. It was stated in the argument before this court that the income of the trust was insufficient to meet the demands upon it, and all the parties agreed that there was such insufficiency. *Held*, that, as the question of the disposition of surplus income was not before the trustees and might never be before them, there was no occasion for this court to consider it. *Pope* v. *Pope*, 432.

10. In a suit in equity by the trustees under a will, the plaintiffs sought instructions in regard to a payment directed to be made to one of the sons of the testator in the first preferred stock of a certain corporation "not later than his twenty-fourth birthday," asking, whether under the circumstances stated in another bill for instructions, which had been filed by the executors of the same will, this son was entitled to any payment of this legacy in stock or money, and, if so, whether he was entitled to receive it when he reached the age of twenty-three years or when he reached the age of twenty-four years. It was stated in the bill of the executors for instructions that the stock referred to was not in the hands of the trustees and was not obtainable in the market. *Held*, that it was not necessary to answer this question. *Ibid.*

Trust.

11. In a suit in equity by the trustee in bankruptcy of a business corporation against an individual defendant who had caused the corporation to be formed to carry on a business formerly conducted by him personally, to compel the specific performance by the defendant of an oral promise to assign to the corporation a lease of the premises in which the business of the corporation had been carried on ever since its formation, where the bill also contains a prayer that the defendant shall be ordered to hold the lease in trust for the corporation or for the plaintiff, if a decree for specific performance cannot be granted because it would compel the defendant to violate a covenant of the lease and would be nugatory and inequitable, the same reasons prevent the granting of a decree that the defendant shall hold the lease as trustee for the corporation or the plaintiff, because such a decree would mean that in equity and good conscience the plaintiff is entitled to a transfer of the lease, which the denial of specific performance decides not to be the case. *Ellis* v. *Small*, 147.

Suit against trustees for accounting, see TRUST, 8, 5–12.

Specific Performance.

12. In a suit in equity by the trustee in bankruptcy of a business corporation against an individual defendant who had caused the corporation to be formed to carry on the business formerly conducted by him personally, to compel the specific performance by the defendant of an oral promise to assign to the corporation a lease held by him of the premises in which

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the business of the corporation had been carried on ever since its formation, it appeared that the lease contained a covenant by the defendant as lessee not to assign or underlet the premises except with the written consent of the lessor, and there was no evidence that the lessor had given or would give his consent to an assignment and he was not a party to the suit. The lease also provided that if the lessee or his representatives or assigns failed to perform any covenant, or if the lessee should be declared a bankrupt or insolvent or an assignment of his property should be made for the benefit of creditors, the lessor might enter and expel the lessee. *Held*, that, assuming that there was a consideration for the defendant's oral agreement to assign the lease, and that there had been such a part performance as to take the case out of the statute of frauds, and assuming also that the conditions on which the defendant promised to assign the lease had been performed, specific performance could not be decreed, because the defendant should not be ordered to violate his covenant, and, even if he should be ordered to violate it, the result would be to give the lessor an immediate right of entry which would deprive the plaintiff of the lease; and, moreover, to order an assignment of the lease to the trustee in bankruptcy of the corporation would violate the spirit and intent of the provision of the lease giving the lessor the right of re-entry if the lessee became bankrupt or insolvent or made an assignment for the benefit of creditors. *Ellis* v. *Small*, 147.

To enforce Condition in Grant of Street Railway Location.

See STREET RAILWAY, 1–3; *ante*, 1.

To enforce Equitable Restrictions.

See EQUITABLE RESTRICTIONS, 6–8.

To enforce Agreement by City to assume Assessment for Betterments.

It was assumed, without being decided, that suit in equity was proper remedy to enforce against city alleged agreement to assume certain assessment for betterments from layout of Columbia Road in Boston, see TAX, 6.

Subrogation.

18. A corporation, organized under the laws of the State of New York, had made a mortgage to secure its bonds covering certain real estate in this Commonwealth. In the mortgage the corporation covenanted with the trustee to pay and discharge all taxes and assessments lawfully imposed upon the mortgaged property. The corporation became insolvent, and a receiver was appointed in the State of New York, who also was appointed ancillary receiver of the property of the corporation in this Commonwealth. The trustee under the mortgage instituted proceedings in this Commonwealth to sell the real estate here at foreclosure sale. Before the trustee took possession of the real estate in this Commonwealth under the mortgage, the city in which it was situated assessed a tax upon it and threat-

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ened to sell it for non-payment of taxes. The ancillary receiver refused to pay the tax, although he had in his hands in the ancillary proceedings in this Commonwealth assets more than sufficient to pay it. While the foreclosure proceedings still were pending and the tax remained unpaid, the trustee under the mortage brought a bill in equity against the receiver and the collector of taxes, alleging the foregoing facts and that a sale by the plaintiff of the property subject to the tax lien would be to the detriment of the bondholders, and praying that the receiver might be ordered to pay the tax or that the plaintiff might pay it and be subrogated to the rights of the collector of taxes against the receiver. The defendant receiver demurred. *Held*, that the demurrer must be overruled, because the plaintiff in order to protect the trust property from an incumbrance, which it was the duty of the insolvent corporation under its covenant with the trustee to pay, was compelled to pay the debt of the corporation to the city, and, upon such payment, the plaintiff was entitled to be subrogated, not only to the rights of the taxpayer as respected the lien on the land, but also to the rights of the tax collector against the fund held by the receiver in this Commonwealth; and that the fact that the tax collector under St. 1909, c. Part II, § 64, might collect the tax by an action against the plaintiff was immaterial. *Equitable Trust Co. of New York* v. *Kelsey*, 416.

To restrain Unfair Competition.

Suit by manufacturer of bread to restrain another manufacturer from offering for sale loaves of bread so closely resembling those manufactured by plaintiff as to be likely to mislead ordinary purchaser into thinking defendant's loaves were plaintiff's, see UNFAIR COMPETITION, 1–4.

To restrain Unlawful Acts of Officers of Corporation.

14. A bill in equity by individual stockholders in a corporation against the corporation, other stockholders and its officers and directors, seeking relief from an alleged wilful breach of duty on the part of the defendants resulting in a sacrifice of the corporation's interests, cannot be maintained unless it appears from the averments of the bill that it is brought, not only on behalf of the plaintiffs as individuals, but either on behalf of the corporation or on behalf of all other stockholders of the corporation who are not plaintiffs or defendants and who may join therein. *Converse* v. *United Shoe Machinery Co.* 539.

To relieve from Results of Fraud.

15. If, in a suit in equity for an accounting against an agent who had undertaken by contract to sell certain personal property for the plaintiff, the contract providing that, if all the property was not sold by a certain date, the agent would purchase it at a price which with previous sales would yield the plaintiff not less than a certain value for which all of it had been appraised, it appears that the defendant in the performance of the contract and in its final settlement defrauded the plaintiff, and that in his dealings with the defendant the plaintiff acted with reasonable care

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under the circumstances, it is no ground for not affording relief to the plaintiff that, by constant and suspicious watching on his part, he might have discovered and have prevented the fraud. *Forbes* v. *Thorpe*, 570.

16. A partnership consisting of two partners made a contract with the owner of certain machinery to sell it for him. In the performance of the contract by the partnership the owner was defrauded, the prices at which sales had been made having been reported falsely to the owner and certain sales having been made that were not reported at all. One, who was a bookkeeper or clerk in the employ of the firm when the contract was undertaken, before its completion bought a part of the interest of one of the partners. Part of the fraudulent acts of the partnership were committed before and part after he acquired his interest. A general statement recapitulating the results of the frauds already committed by the original partners was prepared after the new partner acquired his share and the contract thereafter was treated by the firm in its accounts as a firm asset. It did not appear that the new partner participated in any way in the management of the business, but he continued to be connected with the partnership in a clerical capacity. A suit in equity by the defrauded owner against all three members of the partnership having been referred to a master who found the foregoing facts, it was *held*, that a decree granting the plaintiff relief against the third partner as well as against the first two was warranted. *Ibid.*

Right of plaintiff in such case to follow assets of partnership into hands of corporation which succeeds it, see *post*, 29; FRAUDS, STATUTE OF, 2.

17. A bill in equity against a builder and certain trustees alleged in substance that the defendants had conspired and jointly by false representations and fraud had induced the plaintiff to enter into a contract to furnish work and materials for the construction of a building on land represented to belong to the builder and to carry out such contract, that the land did not then belong to the builder but later was acquired by him subject to a construction mortgage to the defendant trustees of such a nature as, under circumstances stated in the bill, to make it practically impossible for the plaintiff to enforce his contract. The prayer of the bill was that the mortgage be declared void, that the land be sold and that the plaintiff be satisfied from the proceeds. A master to whom the suit was referred found in substance that the builder had negotiated with the owner for the purchase of the land with a view to building a block of houses thereon, and, before the terms of purchase were concluded, had induced the plaintiff by false representations to begin work on the lot, a written contract as to the work having been made between the plaintiff and the defendant builder. The plaintiff had no direct dealings with the defendant trustees and made no inquiries of them and received no information from them directly or indirectly. More than fifteen days after the making of the contract with the plaintiff the builder through deceit practised upon the owner, in which the managing trustee participated, procured a conveyance of the land to him and at the same time executed to the trustees a construction mortgage of such a nature as to make it "not only possible but probable at the outset" that the builder would be unable to proceed and that the

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plaintiff would be unable to enforce performance of his contract. The managing trustee maintained the relation of mortgagee to the enterprise and had no other active interest regarding it. All joint action between the builder and the other defendants ended with the execution of the mortgage. The managing trustee did not intend the builder to fail and did not have the equivalent of actual knowledge of his operations. The builder did fail and the plaintiff suffered a loss. *Held*, that on such facts the trustees were not liable for the misrepresentations of the builder and that the suit could not be maintained for the purposes for which it was brought. *New England Foundation Co.* v. *Reed*, 556.

18. Where in a suit in equity it is sought to fix upon several defendants liability for damages resulting from deceit and fraud actively practised upon the plaintiff by one only of the defendants on the ground that all of the defendants conspired in the deceit and fraud, passive observation of the conduct or readiness to profit by a failure in duty of the actively fraudulent defendant is not enough to make his co-defendants liable in the absence of some relation on their part of agent, copartner or confederate toward him. *Ibid.*

Suit to set aside conveyance for unsoundness of mind and undue influence, see *post*, 21, 22.

Suit to set aside conveyance alleged to have been made in fraud of creditors, see *post*, 19, 20.

Protection of Property from Apprehended Conversion.

Proper remedy, in case there is apprehension lest executor of will or administrator of estate with will annexed shall convert property of estate while question as to propriety of certain transfers of property to himself by execution is pending in Probate Court where executor's accounts are being passed upon, is not by action at law for conversion but is by bill in equity, see EXECUTOR AND ADMINISTRATOR, 2.

To set aside Conveyance in Fraud of Creditors.

19. A conveyance and transfer of property by a husband through an intermediary to his wife is not shown to be in fraud of subsequent creditors simply by proof that the conveyance and transfer were made with a design to settle the property upon the wife so that it should not be exposed to the hazards of the husband's future business or liable for any future debts that he might contract. It is necessary to go further and to show that at the time of the conveyance the husband had an actual intent to contract debts and a purpose to avoid by the conveyance and transfer the payment of them. In a suit in equity by the trustee in bankruptcy of the estate of a husband against the wife of the bankrupt to set aside a conveyance and transfer, such a fraudulent purpose here was shown on the part of the husband of which the wife was cognizant and in which she participated. *Gately* v. *Kappler*, 426.

20. In a suit in equity by the trustee in bankruptcy of the estate of a husband against the wife of a bankrupt to set aside conveyances of real

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and personal property from the husband through an intermediary to his wife on the ground that they were fraudulent as against future creditors, there was evidence which fully warranted, if it did not require, the general finding, which was made by a master, that the conveyances were in fraud of future creditors, and no special finding was made by the master which was inconsistent with this general finding. The master also found, on evidence not reported by him, that the defendant was fully cognisant of this fraudulent intent of her husband "and participated therein, and accepted the said conveyances with knowledge that they were made to hinder, delay and defraud his future creditors." *Held*, that, as both the grantor and the grantee participated in the fraud, the conveyances, whether voluntary or for a valuable consideration, were void as to creditors, and it therefore was unnecessary to consider what, if any, equitable interest the wife had in the real estate before the conveyances, because she could take nothing by the conveyances and must be relegated to such rights as she had before they were made. *Gately* v. *Cappler*, 429.

To set aside Conveyance for Unsoundness of Mind and Undue Influence.

21. A son of a deceased father can maintain a suit in equity against a sister and a brother of the plaintiff, the three being all the children and all the heirs at law of the deceased and the defendant sister being the executrix of the father's will, to set aside conveyances of real estate which were made by the deceased to his daughter when he was insane and which were neither ratified nor avoided by the father during his lifetime, the executrix of the will having no power to ratify such a deed to the prejudice of the heirs of the testator. *Brown* v. *Brown*, 388.

22. In a suit in equity, by a brother against his sister, to set aside a conveyance of real estate alleged to have been made to the defendant by the father of the plaintiff and the defendant when he was insane and under the undue influence of the defendant, where it appears that the father had died, that his will, of which the defendant is executrix, was allowed and that the deed sought to be set aside was made seven years before the date of the will, and a master has found that the deceased was of unsound mind when he executed the deed, that after executing it he at times appeared to be rational but that his disease continued, that he was at no time free from it after giving the deed and that the influence of his daughter over him also continued, the fact of the allowance of the will is not conclusive of the issue in the case, but merely shows that the testator when he executed it was of sufficiently sound mind to make a will. *Ibid.*

To establish Rights under Unrecorded Lease for Term of more than Seven Years.

23. Under R. L. c. 127, § 4, if a person enters into a contract to purchase certain land and makes a part payment under the contract, without knowledge that the land is leased by an unrecorded lease for more than seven years, and then such intending purchaser is informed of the existence of the lease, he is deprived by such notice of the power to become an

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innocent purchaser, and if he chooses to complete the contract by paying the balance of the purchase money and taking a deed of the land, he holds it subject to the lease, which the lessee by a suit in equity may establish against him. *Wenz* v. *Pastene*, 859.

24. In a suit in equity by the lessee of certain real estate under an unrecorded lease for a term of more than seven years, against the purchaser of the real estate at a foreclosure sale, to enjoin the defendant from ejecting the plaintiff and to establish the lease, it appeared that the defendant as the highest bidder at the sale entered into a contract to purchase the property and made a part payment of $2,000, and that at the time he entered into such contract and made such payment he had not actual notice of the existence of the lease, but that before the delivery of the deed to him and his payment of the balance of the purchase money, $40,000, he had actual notice of the lease, and that he paid such balance and took his deed, although the terms of the sale provided that, if he discovered and gave notice to the mortgagee of a material defect in the title, the mortgagee should perfect the title or return the part payment. The defendant contended that, if the plaintiff's lease was established against him, such establishment should be made conditional upon the payment of $2,000 by the plaintiff to the defendant to reimburse him for the part payment made by him before he had knowledge of the lease. In a decision establishing the plaintiff's lease and enjoining his ejectment, it was *held*, that under the circumstances the decree should contain no condition of a prepayment of $2,000 by the plaintiff. *Ibid.*

To apply for Satisfaction of Debt Fund created for that Purpose.

25. By an instrument purporting to be his will, an alleged testator left practically all of his property to one brother of several brothers and sisters. Descendants of other brothers and sisters, who, in case of intestacy, would have been entitled to seven twenty-seconds of the estate of the decedent contested the allowance of the will, and procured large advances of money for that purpose from a stranger to whom and to one of their own number they assigned a part of their "interests in said estate" of the alleged testator, the proceeds of the interests so conveyed to be used, first, to repay all moneys advanced, second, to pay "lawyers bills and for other expenses." After a trial and a disagreement of the jury, and after a series of compromise agreements with other next of kin of the alleged testator, a decree was made allowing the will and adopting all of the agreements, so that the contestants, instead of receiving no part of the estate, received five twenty-seconds of it, and provision also was made for the payment of all their expenses, which were very large. *Held*, that for the re-payment to him of the advances so made by him the stranger was entitled to an equitable charge upon the interests, of which he had taken an assignment, in the shares due to the contestants under the compromise decree, the fact that the will was allowed not being material because such allowance was merely formal, the decree accompanying it being virtually a disallowance of the provisions of the will in favor of the contestants. *Coram* v. *Davis*, 229.

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26. By an instrument purporting to be his will, an alleged testator left practically all of his property to one brother of eleven brothers and sisters. Some others of the next of kin of the decedent, who in case of intestacy would have been entitled to seven twenty-seconds of the estate, contested the allowance of the will, and a stranger, on their promise to reimburse him from their shares, made large advances of money to them for that purpose and on their behalf employed counsel to whom he agreed to pay a large fee "in case the will is defeated and our clients get their shares." Pending the contest the brother who was to benefit by the will died. After a trial which resulted in a disagreement of the jury, a compromise agreement was made whereby those succeeding to the brother's interests were to receive twenty, and the contestants were to receive thirty-five one-hundred tenths, and each group was to receive "on account of expenses heretofore incurred" $500,000, the balance to be equally divided between the two groups, and, to carry out the agreement, those succeeding to the brother's interests and the contestants were each to receive twenty one-hundred tenths forthwith, the remaining fifteen one-hundred tenths to be paid to the contestants when all court proceedings properly were ended, and the remainder of the estate was to be placed in the possession of trustees to carry out the agreement. The agreement also provided that all expenses incurred in carrying it out should be furnished, one half by those succeeding to the brother's interests and one half by the stranger, one of the trustees and one of the contestants, and "that the parties who furnish such funds shall be entitled to reimbursement." The stranger, with the trustee and the contestant referred to, signed the agreement and agreed to make advances according to its provisions, and the stranger made further advances. After extended negotiations with the other next of kin a decree finally was made distributing the estate in accordance with agreements of the parties, and a fund was paid to the trustees. The counsel brought a suit against the stranger and recovered judgment for his fee contingently promised. *Held*, that the stranger, both for the re-payment of the advances of money which he had made and for the payment of the judgment for the contingent fee of the counsel whom he had employed, was entitled by a suit in equity to avail himself of the fund thus set apart for the relief of the contestants, and, through them, for his relief. *Coram* v. *Davis*, 229.

27. By an agreement in writing made between the parties to a contest as to the proof of a will, it was provided that a part of the estate of the decedent should be paid to trustees who therefrom should pay a certain amount to each of the parties to the contest "on account of expenses and litigation heretofore incurred," that "all expenses incurred in the carrying out of" the agreement should be furnished, one half by one of the parties to the contest, and one half by one of the trustees, the other contestant and a stranger who previously had made advances, and "that the parties who furnish such funds shall be entitled to reimbursement of the same." The three parties who by the provisions of the agreement were to pay the second half of the expenses incurred in carrying it out also signed an agreement, appended thereto, that they would "from time to time, as required

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by the representatives of the parties" named in the agreement, advance one half of such expenses. The stranger advanced large sums of money for the carrying out of the agreement without the trustees requiring him so to do. *Held*, that the limitation of the stranger's undertaking as to making advances, that they should be required by the parties, did not preclude him from establishing an equitable charge upon the funds in the hands of the trustees for all of his advances, since the agreement creating the trust provided that all sums advanced for the purpose of carrying out the agreement should be repaid. *Coram* v. *Davis*, 229.

28. Where one, who has made advances of money and rendered himself liable for the payment of a further sum on behalf of certain of the next of kin of a decedent in a contest against the allowance of the decedent's will, has a right to charge with the payment of such sums certain parts of the shares of certain of the next of kin and a fund which, by a decree of the Probate Court adopting compromise agreements of the parties, was to be paid to trustees for the payment of expenses attending the contest, he may enforce such right by a bill in equity, to which a demurrer on the ground that he has an adequate remedy at law will not be sustained. *Ibid.*

Bill in such case was held not to be open to demurrer on ground of multifariousness or because remedy was barred by statute of limitations or by laches, see *ante*, 2–4; EQUITY PLEADING AND PRACTICE, 1–3.

To reach and apply Equitable Assets.

29. Real and personal property with which the business of a partnership composed of two partners was conducted was held by one of them as trustee for the partnership. The partnership, in performing as agents a contract with the owner of certain goods for their sale, defrauded the owner. During the performance of the contract a third partner was added to the firm, who took no part in the management of the business but acted merely in a clerical capacity. Thereafter, by reason of pressure by an individual creditor of one of the partners, the partner who held the property as trustee and the other active partner by an instrument under seal conveyed all the business and assets of the partnership to an intermediary as trustee for the benefit of and pending the organization of a corporation, subject to "all the debts and liabilities of" the two active partners "contracted in or arising from or on account of" the business and property conveyed. After the charter of the corporation was issued the intermediary conveyed to the corporation what had been conveyed to him by an instrument under seal, with a clause subjecting the property conveyed to debts and liabilities incurred by the two active partners, and the conveyance to the corporation was upon condition that the corporation should pay and discharge "all and singular the indebtedness and liabilities of" the two active partners "contracted in or arising from or on account of the conduct of said business carried on under the name of" the partnership. The statement of debts furnished to the corporation did not include that arising out of the fraud in the performance of the contract above referred to, and no one but the two active partners knew of it and they had no reason to believe that it would be discovered. Capital stock

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was issued to the three partners and to the wife of one of them. *Held*, that the property right of the partnership to compel the corporation to perform its covenant as to payment of the partnership liabilities, not being one that could be attached at law, could be reached in a suit in equity by the person whom the partnership had defrauded, and that he might in such a suit against the partners and the corporation establish his claim against the partners and enforce payment of it by the corporation. *Forbes* v. *Thorpe*, 570.

Cross bill of corporation against partners in such case, see EQUITY PLEADING AND PRACTICE, 6, 7.

Fundamental liability of partnership in such case, see *ante*, 15, 16.

Who are necessary parties to suit to reach and apply certain equitable assets in hands of various defendants in satisfaction of debt due to plaintiff from principal defendant who, as stockholder of corporation incorporated under laws of another State, was under liability to plaintiff, see CORPORATION, 4.

No Jurisdiction to restrain Public Nuisance without Private Damage.

30. The owner of land used for the storage of boats cannot maintain a bill in equity against a railroad corporation to restrain the defendant from constructing a conduit which will diminish the flow of a certain creek so that access to the plaintiff's land will be impaired and the waters of the creek, which is an arm of the sea, will "ebb and flow upon the plaintiff's premises in such a way as to render them useless for the purpose of storing boats thereon," because the act of which the plaintiff complains is a public nuisance and he alleges no such peculiar damage as will entitle him to maintain a private suit or action. *Dwyer* v. *New York, New Haven, & Hartford Railroad*, 419.

Proceedings to compel Action to try Adverse Claim to Land.

See that title.

Bona Fide Purchaser.

Person who enters into contract to purchase land not knowing that land is subject to unrecorded lease exceeding seven years, who before consummation of purchase learns of lease but completes purchase nevertheless, is not in position of purchaser of land for value without notice of lease, but takes land subject to it, and cannot compel lessee who sues to establish his rights to reimburse him to any extent, see *ante*, 23, 24.

EQUITY PLEADING AND PRACTICE.

Parties.

Certain bill in equity was held not multifarious because all parties were not interested in same way or to same extent, see *post*, 2.

It is not proper function of cross bill to bring in new parties who are not essential to case set out in original bill, see *post*, 4.

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Corporation, which formerly had owned large parcel of land from which it had conveyed separate lots subject to equitable restrictions for benefit of other lots in large parcel, was held to be proper party to join in suit as plaintiff to enforce restrictions, see EQUITABLE RESTRICTIONS, 6.

Suit in equity by shareholders in corporation against corporation and directors to restrain alleged unlawful acts of officers must contain allegation that it is brought by plaintiffs on behalf of themselves and all other shareholders of corporation who are not plaintiffs or defendants and who may join therein, see EQUITY JURISDICTION, 14.

Who are necessary parties to suit to reach and apply certain equitable assets in hands of various defendants in satisfaction of debt due to plaintiff from principal defendant who as stockholder in corporation incorporated under laws of another State was under liability to plaintiff, see CORPORATION, 4.

Bill.

1. The fact, that in a bill in equity different means are sought for the enforcement of one equitable right relating to the whole or different parts of one estate, does not make the bill multifarious. *Coram* v. *Davis*, 229.

2. It is not indispensable that all the parties to a suit in equity should have an interest in all the matters contained in the suit. It is sufficient if each party has an interest in some matters in the suit and that they are connected with the others; and, even if one is a necessary party to one part only of the case, the bill is not therefore necessarily multifarious. *Ibid.*

3. In a bill in equity there were joined as parties defendant the administrator of an estate, and all the parties who by a decree of the Probate Court were found to be entitled to share in the final distribution of the estate, including certain persons to whom as trustees was to be paid from the estate a fund which they were to use in paying expenses of various of the next of kin in bringing about a settlement of a contest as to the allowance of an alleged will of the decedent. A partial distribution of the same estate in administration in another State had taken place. By the bill the plaintiff sought to charge the shares of certain of those interested as distributees and the trust fund with the payment to him of sums which he had advanced for such distributees in furthering the contest and bringing about the settlement, and also to compel the payment to him of the shares of two of the distributees which he had purchased. *Held*, that the bill was not multifarious, since it sought the determination of all rights of the plaintiff in a single estate, and it was for the interest of all parties that the whole question of the plaintiff's rights in the estate should be settled once for all in one suit. *Ibid.*

Nor is such bill demurrable on ground it is barred by laches or statute of limitations or that plaintiff has adequate remedy at law, see EQUITY JURISDICTION, 2–4, 28.

Exception to refusal by master to allow defendant to introduce original bill, which was sworn to, in evidence at trial of suit upon amended bill which had been substituted for original, which was not sustained because on record no harm to defendant by ruling was shown, see EVIDENCE, 10.

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Cross Bill.

4. It is not a proper function of a cross bill in equity to bring in new parties who are not essential to the case set out in the original bill. *Forbes* v. *Thorpe*, 570.
5. In a suit in equity it is correct practice for one defendant to bring to the attention of the court by a cross bill any rights he may have against a co-defendant growing out of the subject matter of the suit, so that justice may be done to all parties touching the cause of litigation by granting affirmative relief, if need be, between the several defendants. *Ibid.*
6. Where, in a suit in equity by the owner of certain property against the members of a partnership who had agreed as agents to sell the property for him and against a corporation to which the partnership had conveyed all its property subject to a covenant by the corporation to pay all the debts and liabilities of the partnership, it appears that the plaintiff should be given the relief he seeks and that two of the members of the partnership had made misrepresentations to the corporation at the time of the transfer of the partnership property to it by failing to include the claim of the plaintiff in a schedule of their debts furnished to it, the corporation by a cross bill may have relief against the partners who had caused its loss by such misrepresentations. *Ibid.*
7. In a suit in equity by the owner of certain property against the members of a partnership, who had agreed as agents to sell the property for him, and against a corporation to which the partnership had conveyed all its property subject to an agreement by the corporation to pay all the debts and liabilities of the partnership, it appeared that the plaintiff should be given the relief he sought and that two of the members of the partnership had made misrepresentations to the corporation at the time of the transfer of the partnership property to it by failing to include the claim of the plaintiff in a schedule of their debts furnished to it. The corporation filed a cross bill setting out the facts as to the misrepresentations of the partners who were its co-defendants and praying for relief against them, and at the hearing of an appeal by it from a final decree for the plaintiff, it sought for a modification of the decree to the effect that the conveyance by the partnership to the corporation should be set aside and that it should be allowed to assert its claim as a creditor against the property for the amount for which it was held liable to the plaintiff. It appeared that case had not been tried upon such a theory before the final decree. *Held*, that the relief sought by the defendant at the hearing on appeal should be denied because it was not within the scope of the cross bill and because the case was not tried with such relief as an issue. *Ibid.*

Demurrer.

If party who might demur to bill on ground that statute of limitations was bar does not do so, another party, who has no such ground of demurrer, cannot raise that objection, see EQUITY JURISDICTION, 2.

Pleadings as Evidence.

See EVIDENCE, 10.

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Master.

Duty of master.

8. It is the sole duty of a master, to whom a suit in equity has been referred under the ordinary rule, to find and report the facts, and he is not required to make general rulings of law as to the effect of such findings. *New England Foundation Co.* v. *Reed*, 556.

Master's discretionary powers.

9. Exceptions to a master's report relating to the admission or exclusion by the master of certain questions addressed to witnesses before him here were overruled as matters within the master's discretion. *Barnett* v. *Rosenberg*, 421.

It is province of master, before whom is being tried suit to set aside conveyance on grounds of grantor's unsoundness of mind and of undue influence of defendant upon him, to exercise discretion in fixing limit of time relating to which evidence of grantor's mental condition will be received, see EVIDENCE, 8.

Recommittal of report.

10. A motion in a suit in equity to recommit a master's report in order that he may report the evidence is addressed to the discretion of the judge who hears the case, and ordinarily will not be granted by him in the absence of a special reason for doing so. An appeal from the denial of such a motion only can be sustained where it is shown that the judge in denying the motion exercised his discretion improperly. *Barnett* v. *Rosenberg*, 421.

11. If the plaintiff in a suit in equity discovers, after the filing of a report, adverse to him, of a master to whom the suit was referred, that through inadvertence he neglected to offer evidence which would have supported his contentions, he should move to recommit the report to the master for the hearing of further evidence. After the report has been confirmed and a decree entered dismissing the bill, from which the plaintiff has appealed, it is too late to ask that the case be reopened. *Atlas Shoe Co.* v. *Bloom*, 563.

Effect of report.

12. Where a master, to whom a suit in equity was referred, in his report finds facts from which it appears that the suit cannot be maintained, the suit will be dismissed although the report also contains rulings by the master to the effect that upon the facts reported the suit should be maintained. *New England Foundation Co.* v. *Reed*, 556.

Findings of fact of master in suit to restrain unfair competition which were held to be clearly wrong because contrary to previous decision of this court, see UNFAIR COMPETITION, 2.

Conduct of Hearing.

13. In a suit in equity by a corporation against its former president, involving the issue whether in a certain transaction the defendant was acting fraudulently or honestly toward the plaintiff, a request of the defendant for

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a ruling, that the burden of proof is on the plaintiff to satisfy the judge by a fair preponderance of the evidence of the existence of a particular fact which the plaintiff has averred in its bill and has relied upon to show fraud, properly may be refused by the judge if the request omits all reference to the fundamental allegation of the defendant's liability for defrauding the plaintiff, which the judge is satisfied is established whether the details of the fact stated in the request are proved or not. *Malden & Melrose Gas Light Co.* v. *Chandler*, 354.

Fact that hypothetical question to expert was needlessly long and complicated does not make its admission necessarily erroneous, see EVIDENCE, 6.

It is province of master, before whom is being tried suit to set aside conveyance on grounds of grantor's unsoundness of mind and of undue influence of defendant upon him, to fix limit of time relating to which evidence of grantor's mental condition will be received, see EVIDENCE, 8.

Use of pleadings as evidence, see EVIDENCE, 10.

Decree.

What would be proper decree in certain suit to enforce equitable restrictions, see EQUITABLE RESTRICTIONS, 7.

Suit in equity reserved is case "reported" within meaning of R. L. c. 173, § 115, and, if reservation is not prosecuted, it may be discharged; and thereupon rulings of judge at hearing, whether right or wrong, become law of case for purposes of final decree, see *post*, 18–20.

Exceptions.

14. Upon exceptions to the rulings of a judge who heard a suit in equity only questions of law are open, and the refusal of the judge to make findings of fact requested and his general finding of a fact upon conflicting evidence cannot be reviewed. *Malden & Melrose Gas Light Co.* v. *Chandler*, 354.

Appeal.

15. A defendant in a suit in equity has no ground for appeal from a decree which grants no relief against him and allows him his costs. *Brown* v. *Brown*, 388.

16. There never has been in this Commonwealth an instance of appeal *in forma pauperis*, which still is allowed in England, from a decree in a suit in equity. Per RUGG, J. *Forbes* v. *Thorpe*, 570.

17. In a suit in equity in the Superior Court against three persons, alleged to have been partners jointly participating in a fraud committed upon the plaintiff, and against a corporation which was alleged to have succeeded the partnership and to be chargeable with the results of the fraud, relief was granted against all of the defendants and they all appealed. At the hearing before this court one of the defendants did not file a brief either personally or through counsel as required by Rule 2 relating to practice before the full court, and did not appear in person or by counsel to argue his appeal. It was said by counsel for other defendants that he was without money to prosecute the appeal. Under such circumstances, *it was stated*,

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that, in the absence of a statute or rule definitely covering the case, the rule of English chancery practice ordinarily would prevail and the appeal would be dismissed; but *in the present case*, this court, expressly stating that the case should not be treated as a precedent, considered the appeal on its merits and dismissed it. *Forbes* v. *Thorpe*, 570.

When appeal from denial of motion to recommit master's report for report of evidence will be allowed, see *ante*, 10.

Report.

Suit in equity reserved is case "reported" within meaning of R. L. c. 173, § 115, and, if reservation is not prosecuted, it may be discharged; and thereupon rulings of judge at hearing, whether right or wrong, become law of case for purposes of final decree, see *post*, 18–20.

Reservation.

Suit in equity reserved is case "reported" within meaning of R. L. c. 173, § 115, and, if reservation is not prosecuted, it may be discharged; and thereupon rulings of judge at hearing, whether right or wrong, become law of case for purposes of final decree, see *post*, 18–20.

Discharge of Reservation for Failure to prosecute.

18. A suit in equity, reserved for consideration by this court in accordance with the provisions of R. L. c. 159, § 29, after a hearing by a judge of the Superior Court, upon the pleadings, the evidence and certain findings made by the trial judge, is a case reported within the meaning of R. L. c. 173, § 115, which among other things provides that, if the plaintiff in a case "reported" in equity neglects to enter the report in the Supreme Judicial Court or to take the necessary measures for the hearing of the case, the court by which the case was reported may, upon application of the adverse party and after notice to all parties interested, order that the report be discharged and that the judgment, opinion, ruling, order or decree appealed from or excepted to be affirmed. *Daly* v. *Foss*, 470.

19. A suit in equity, after it had been heard in the Superior Court and the trial judge had made findings of fact and rulings of law, and after many further delays, for which the plaintiff in some degree was responsible, finally came before the court for final decree, and thereupon on an October 18 a reservation under R. L. c. 159, § 29, was signed by the trial judge. On the following December 5 a motion by the defendant under R. L. c. 173, § 115, that the reservation be discharged and that the rulings of the trial judge be affirmed because the plaintiff had neglected to take the necessary steps or measures for the completion of the reservation and the hearing of the case in the Supreme Judicial Court, was allowed and a final decree in accordance with those rulings was made. *Held*, that the order of the judge was within his power, because under R. L. c. 159, §§ 29, 19, the reservation should have been entered in the Supreme Judicial Court at least within thirty days after October 18. *Ibid.*

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20. Where, in a suit in equity seeking to enjoin the defendant from certain alleged violations of equitable restrictions upon the use of his land, the trial judge rules, "I find that I ought not, in the exercise of my discretion, to issue any injunction as prayed for in this case" and that the plaintiff had suffered no damages because of the alleged acts of the defendant, and, upon motion of the defendant under R. L. c. 173, § 115, a reservation of the case, which was made under R. L. c. 159, § 29, is discharged and the rulings of the judge are affirmed because the plaintiff neglected to take the necessary steps or measures for the completion of the reservation and the hearing of the case in the Supreme Judicial Court, the rulings of the judge, whether right or wrong, become the law of the case, and therefore a final decree dismissing the bill with costs is proper. *Daly* v. *Foss*, 470.

Change of Theory of Trial after Appeal.

Change after appeal of theory upon which case was tried precluded appellant from having new contention considered, see *ante*, 7.

Reopening of Case.

After report of master has been confirmed and decree entered dismissing bill, from which plaintiff has appealed, it is too late to reopen case for admission of evidence which was not introduced before because of inadvertence of plaintiff, see *ante*, 11.

ESTOPPEL.

Certain acts of shareholder in corporation which were held not to estop corporation from sharing in benefits of suit for accounting against trustees of trust of which it was beneficiary, see TRUST, 9.

Contentions, which were not relied on in Land Court, or in Superior Court at trial of jury issues on appeal from Land Court, and which are inconsistent with contentions there made, cannot be urged on exceptions to this court, see WAY, 8.

EVIDENCE.

Presumptions and Burden of Proof.

1. Where at the trial of an action an affirmative issue must be established by one party upon evidence, a part of which is oral, ordinarily a ruling that such party as matter of law is entitled to recover cannot be given. *Evans* v. *County of Middlesex*, 474.
2. In an action for the alleged breach of a contract in writing, by which the plaintiff, who was the exclusive agent of the manufacturer for the sale in New England of a certain kind of automobile and was authorized to establish sub-agencies, agreed with the defendant to sell him these automobiles at a discount of ten per cent, and the defendant agreed to devote his entire time during a specified period to selling these automobiles and to have no business with the manufacturer except through the plaintiff, the defense, that the written contract between the parties was waived and that the relation of principal and agent was substituted for it, is an affirmative one,

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and if the defendant sets it up the burden is on him to prove it. *Bangs* v. *Farr*, 339.

3. In an action for personal injuries alleged to have been caused by the negligence of the defendant, where the evidence is wholly circumstantial, although the plaintiff is not bound to exclude the possibility of every cause for the accident from which he suffered other than the negligence of the defendant, he must present evidence showing the greater likelihood that the negligence of the defendant was such cause, and if on the facts disclosed by the evidence it is as reasonable to suppose that the cause of the accident was one for which no liability would attach to the defendant as one for which the defendant is liable, the plaintiff has not made out a case which entitles him to go to the jury. *Bigwood* v. *Boston & Northern Street Railway*, 345.

Application of foregoing principle, see NEGLIGENCE, 20.

Presumption of fact as to truth of statement in criminal complaint that certain fact was unknown to complainant, see PRACTICE, CRIMINAL, 1, 2.

Presumption that certain contract by corporation, implied from facts, was made under adequate authority, see CONTRACT, 12.

There is no presumption that minor at any particular age is capable of comprehending risks or of negligence, see NEGLIGENCE, 1, 2.

From fact of open, continuous and persistent user of way over certain land, knowledge of such user, or acquiescence therein on part of owner of land, can be inferred, see WAY, 2.

In suit in equity by beneficiary under express trust against trustee for accounting, burden is upon defendant to show that in discharge of duties he has exercised skill, prudence and judgment, see TRUST, 5.

Case where at trial only evidence was report of auditor and some oral evidence which was held not to affect conclusions reached by auditor, and where, therefore, it was held that verdict rightly was ordered for plaintiff in accordance with those conclusions, see PRACTICE, CIVIL, 3, 4.

Construction of provisions of St. 1909, c. 534, § 16, relating to what shall be *prima facie* evidence of violation of prohibitions of that statute as to operation of automobiles, see AUTOMOBILE, 6–9.

Where, at trial of action by corporation against administrator on promissory notes, it appears that notes were signed by intestate and were indorsed in blank by payee who had delivered them to plaintiff on its paying to him their amount, and there is circumstantial evidence that when intestate signed them he did so under agreement with corporation to hold him harmless, there is question for jury as to whether, when plaintiff paid amount of notes to payee, it did not pay its own notes and extinguish them, see CONTRACT, 13.

Fact, that seven years after making deed grantor made will which after his death was allowed, is not conclusive evidence on issues in suit in equity to set aside deed because it was proved by undue influence or fraud or was made while grantor was of unsound mind, see EQUITY JURISDICTION, 22.

Certain agreement as to facts, made by counsel for parties in action of contract, was held not to effect burden of proof, and ordering of verdict for plaintiff was held to be improper, see PRACTICE, CIVIL, 2; AGENCY, 2.

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Circumstantial.

Statement of principles of law relating to burden of proof in actions for personal injuries caused by negligence, where plaintiff relies on circumstantial evidence, and application of them in action against street railway company for personal injuries caused by explosion of box of dynamite into which street car ran on public way, it being held that determination of responsibility for accident was left by evidence too much to conjecture, see *ante*, 3; NEGLIGENCE, 20.

Where, at trial of action by corporation against administrator on promissory notes, it appears that notes were signed by intestate and were indorsed in blank by payee who had delivered them to plaintiff on its paying to him their amount, and there is circumstantial evidence that when intestate signed them he did so under agreement with corporation to hold him harmless, there is question for jury as to whether, when plaintiff paid amount of notes to payee, it did not pay its own notes and extinguish them, see CONTRACT, 13.

Relevancy and Materiality.

4. In an action for the breach of a contract in writing, it appeared that the provisions of the contract were as follows: "For and in consideration of the surrender of a certain agreement . . . signed by W in regard to the payment of a commission, . . . I [the defendant] hereby agree to deliver to [the plaintiff] two thousand shares of the capital stock of a company formed or to be formed to take over said property. Said stock to be delivered as soon as issued; . . . above company to be known as East Butte Mining Company. In case of failure of these properties being sold as at present agreed this agreement to be null and void." There was evidence tending to show that at the time the agreement was made the defendant had formed a corporation under the laws of Arizona called the East Butte Copper Mining Company, that he had entered into negotiations with a firm of stockbrokers in Boston, who had proposed to organize a corporation under the laws of the State of Maine to be called the East Butte Mining Company and to be controlled by them, which negotiations were pending when the contract sued on was made, that later those negotiations had fallen through, when the defendant entered into negotiations with a second firm of Boston stockbrokers, who undertook the defendant's enterprise through the use of the corporation he already had formed. The plaintiff demanded and the defendant refused to deliver shares in the Arizona corporation. The defendant contended that the words in the contract, "In case of failure of these properties being sold as at present agreed" referred to the negotiations with the first Boston firm, and that, they having fallen through, the contract according to its terms became "null and void," and he offered and the presiding judge refused to admit evidence tending to show that responsible persons had been ready to furnish money needed for the enterprise if the report of the first Boston firm and their mining expert were satisfactory, and had furnished a part of it, and also evidence as to a pooling of the stock of the Arizona corporation and as to expenses incurred by the defendant between the time

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when negotiations with the first Boston firm were discontinued and those with the second firm were completed. *Held*, that the evidence rightly was excluded as immaterial. *Hodgens* v. *Sullivan*, 533.

Certain evidence was held to have been relevant and material and certain answer of witness to be responsive to question at trial of indictment for murder, see HOMICIDE, 7.

Certain evidence, admitted at trial of petition for damages resulting from destruction of private way in proceedings for abolition of grade crossing of railroad with private way, which related to expense of procuring another private way to replace that destroyed and which, as guarded by instructions of judge, was held properly to have been admitted, see DAMAGES, 4.

Extrinsic affecting Writings.

5. At the trial of an action by a plumber and piper against a general contractor upon a contract in writing, by which the plaintiff agreed to furnish all the work of "plumbing, gas-piping, and ice water plant piping" in a certain building then being constructed by the defendant for the owner, it appeared that the contract contained a plain provision that the defendant should not be held to pay anything for changes, additions or extra work unless such work was ordered by the defendant in writing. The work for which the plaintiff sought compensation was extra work for which no order in writing ever was given by the defendant. The plaintiff offered to show a general custom, known to the parties, that in cases of contracts between a sub-contractor and a general contractor, which contained such a provision, it was customary for the general contractor to direct the sub-contractor to proceed with extra work without waiting for a written order, for the sub-contractor so to proceed and for the written order to be delivered by the general contractor later, either during the progress of the extra work or after its completion, and that the plaintiff had proceeded with the extra work in question without waiting for written orders, relying upon this general custom. There was no evidence of an oral order for the extra work having been given by the defendant or in his behalf. The judge excluded the evidence. *Held*, that the evidence was excluded rightly; both because there was no evidence of an oral order by the defendant or some one authorized by him for the extra work, and because the natural meaning of the provision of the contract was that the written order to do the work should be given before the work was begun, and the evidence therefore was rejected properly as an attempt to vary the express language of the contract; and also because, even if it should be assumed that the alleged custom was not inconsistent with the contract and that the plaintiff relied upon it, he relied upon it at his peril and took the risk of no order in writing being given later, and in the present case no order in writing ever was given. *Johnson* v. *Norcross Brothers*, 445.

Instrument held to be non-negotiable promissory note which maker could not show was intended only for memorandum, see BILLS AND NOTES, 1.

Certain contract was held to be ambiguous, and action of judge, in leaving to jury as question of fact question as to what was referred to by certain

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words therein, was held to have been proper, see CONTRACT, 3; PRACTICE, CIVIL, 1.

Opinion: Experts.

6. On an exception in a suit in equity to the admission by the master to whom the case was referred of a hypothetical question to an expert, if all the facts assumed in the question were found by the master to have been proved and there was no error of law, the exception will be overruled, although the question was needlessly long and complicated. *Brown* v. *Brown*, 388.

Declarations of Deceased Persons.

Evidence of declarations of superintendent of mill of petitioner for registration of title to certain land, to effect that passageway must be left open across land for use of respondent, were held to be admissible in evidence, at trial of issues raised by petition, after death of superintendent, see WAY, 7.

Books of Account.

7. Books of account as to mercantile transactions, the entries in which were transcribed from temporary memoranda made by clerks who had no knowledge of the sale and delivery of the goods therein mentioned except upon information received from other clerks whose duties are not shown, are not admissible in evidence to prove the state of the account upon the sole supporting testimony of the clerks who made the entries in them. *Atlas Shoe Co.* v. *Bloom*, 563.

Pleadings as Evidence.

See *post*, 10.

Of Mental Condition.

8. Where a suit in equity, to set aside a conveyance of real estate made to the defendant by a person deceased on the ground of the grantor's unsoundness of mind and of the undue influence of the defendant upon the grantor when the deed was made, is referred to a master, it is the province of the master to fix the limit of the time relating to which evidence of the grantor's mental condition will be received by him. In the present case it was held that the master could not be said to have gone too far in the exercise of his discretion in admitting evidence of the grantor's mental condition covering a period of eight years after the making of the deed sought to be set aside. *Brown* v. *Brown*, 388.

Of Information furnishing Ground for Suspicion.

Principles of law governing right of peace officer to make arrest of person suspected of having committed felony, and evidence proper to prove existence of reasonable ground for suspicion, see HOMICIDE, 3–6.

Of Existence of Suspicion.

Principles of law governing right of peace officer to make arrest of person suspected of having committed felony, and evidence proper to prove existence of suspicion, see HOMICIDE, 3–6.

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Of Supposed Knowledge to explain Character of Act.

See NEGLIGENCE, 26.

Of Judgment of another State.

9. A number of copies of papers filed in divorce proceedings between certain parties in a court of Michigan, bound together and bearing a certificate of the clerk of the court in which the proceeding was that "the writings annexed are true copies of originals on file and of record in [his] office, and that said originals, together, constitute the record of the proceedings of said court in this cause," is a proper record under R. L. c. 175, § 71, to prove the record of the Michigan court in an action at law in this Commonwealth upon a decree therein for alimony and money expended for the support of a minor child, although by a copy of the "calendar entries" in such proceedings, which was one of the papers included in those thus bound together, it appears that there were not included among the papers offered copies of some papers on file with the clerk of the Michigan court. *Wells* v. *Wells*, 282.

Original Bill in Equity as Evidence after Substitution of Amended Bill.

10. In a suit in equity in which an amended bill had been filed by the plaintiff, which afterwards was further amended, the defendant excepted to a ruling of the master to whom the case was referred excluding from the evidence the plaintiff's original bill before amendment, which, with the jurat attached, was offered by the defendant "as bearing upon the genuineness of the plaintiff's claim." The case was tried on the amended bill and no copy of the original bill was in the record which came to this court by appeal, nor was there any statement of its contents, and it did not appear in what way it was contradictory either to the claim as alleged in the amended bill or to the testimony of the plaintiff. *Held*, that the exception was too indefinite to be sustained, and that it also must be overruled on the ground that the record did not show that the exclusion of the original bill by the master might or could have harmed the defendant. *Barnett* v. *Rosenberg*, 421.

EXCEPTIONS.

In actions at law, see PRACTICE, CIVIL, 6–8, 13–15; ATTORNEY AT LAW, 2, 4; CONTRACT, 5, 6; WAY, 8.
In suits in equity, see EQUITY PLEADING AND PRACTICE, 14.
In criminal proceedings, see PRACTICE, CRIMINAL, 5.

EXECUTION.

1. When by a final order of court an officer has been allowed to amend his return upon an execution and makes such amendment in accordance with the order, a copy of the amended return filed in the registry of deeds has the same effect as if the amendment had been incorporated in the original return. *Hunneman* v. *Lowell Institution for Savings*, 368.

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2. Where an execution is levied upon land which already was attached in the same action on mesne process, the plaintiff's rights under the attachment are not affected by other attachments that intervene while the levy of the execution is proceeding and before it is completed as far as the nature of the case permits. *Hunneman* v. *Lowell Institution for Savings*, 368.
3. Under R. L. c. 178, § 4, the requirement that an officer who has taken land on execution shall deposit a copy of the execution in the registry of deeds applies only to an execution levied on land which was not attached on mesne process. *Ibid.*

EXECUTOR AND ADMINISTRATOR.

1. A testatrix, by the fourth article of her will, devised and bequeathed the residue of her estate to her brother "to have and to hold, use and improve the same, without the intervention of any trustee, for and during his natural life; and on his decease I give, devise and bequeath whatever may then be remaining of said rest and residue and accumulations, if any, to said town of W," to be used for public purposes. The brother of the testatrix was made executor of the will. He died without rendering any probate account, and after his death an account of his administration of his sister's estate was presented to the Probate Court in which he was credited with the amount of the "rest and residue paid over, transferred and delivered" to himself "as residuary legatee under article fourth of will." The Probate Court made a decree allowing the item. On an appeal from the decree there was no extrinsic evidence. *Held*, that the beneficiary was entitled as trustee in his own behalf to the possession and control of the principal of the personal property of his sister's estate with the right of unrestricted expenditure of the income, that a decree of distribution for the transfer of the property was unnecessary, as the allowance of the account in which the executor was credited with the transfer of the residue to himself had the same effect as a decree of distribution, and that the decree allowing the account should be affirmed. *Rhines* v. *Wentworth*, 585.
2. An action at law will not lie against an executor for the alleged conversion of the residue of the personal estate of his testator by transferring it to himself as residuary legatee, if it appears by the declaration that the question of the legality of such transfer is pending in the Probate Court in the proceedings upon the allowance of the executor's account, in which all persons interested in the estate have the right to appear. If an interested person is apprehensive that, before the account is passed upon, the property for which the executor is bound to account may be wasted or converted, his remedy is by a bill in equity. *Ibid.*

Executor of will has no power to ratify deed of testator made when he was of unsound mind or under undue influence, see EQUITY JURISDICTION, 21.

Certain directions in will to "trustees" were held to be direction to executors, see DEVISE AND LEGACY, 6.

Final decree of Probate Court having jurisdiction of settlement of estate of certain decedent, determining parties who shall share therein, does not bar

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suit in equity against administrator and certain beneficiaries to enforce equitable charge upon shares of beneficiaries who are defendants, see EQUITY JURISDICTION, 8.

Suit against administrator with will annexed and beneficiaries in estate of certain decedent to fix upon funds in hands of administrator equitable charge, in accordance with agreement with plaintiff, for claim of plaintiff arising from his procuring establishment of rights in decedent's estate of certain defendants who were beneficiaries, see EQUITY JURISDICTION, 8, 25–28.

Personal property outside of Commonwealth and in possession of executor of will of person who died domiciled here, where executor lives outside Commonwealth and is ancillary administrator of estate of decedent in State where property is situated, is not subject to taxation in this Commonwealth, see TAX, 4.

Allowance of final accounts of administrator with will annexed and of trustee under will was held under certain circumstances not to preclude Commonwealth thereafter from claiming succession and inheritance tax under St. 1891, c. 425, as amended by St. 1902, c. 473, see TAX, 10.

Where one died testate and, controversy arising as to will, agreement of compromise is made and decree of Probate Court entered in accordance therewith, tax on successions and inheritances should be assessed on property as disposed of under will and not as disposed of under decree of compromise, see TAX, 12.

EXPRESS COMPANY.

Provision in contract of carriage by express company limiting extent to which it could be held liable for injury to goods or animals in transportation becomes of no effect when carrier makes material departure from method of transportation, so that shipper becomes entitled to recover full compensation for any loss sustained by him through carrier's breach of contract, see CARRIER, 1, 2.

FALSE AND FRAUDULENT REPRESENTATIONS.

Title to certain land which was procured by false and fraudulent representations cannot be registered by Land Court against objection of person from whom title was procured, see FRAUD, 1.

FERRY.

Chapters 188 and 345 of St. 1871, which gave Winnisimmet Company, corporation maintaining ferry between Boston and Chelsea, right to take certain property by eminent domain, also gave it right to take all easements appurtenant thereto, see EMINENT DOMAIN, 2.

FIXTURES.

Right of tenant, petitioning for damages caused by destruction, in course of abolition of grade crossing of railroad with private way, of private way

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which was only means of access to leased premises upon which he had erected buildings and certain fixed machinery, to have damages awarded for loss of use of such structures, see DAMAGES, 3, 6.

FOOD.

Violation of statutory provisions as to sale of milk, see MILK, 1–6.

FRAUD.

1. A person, who by information given to the assessors of a city procured certain land to be taxed as belonging to persons unknown, and who afterwards, when the land had been sold for non-payment of taxes, procured a deed of the land to himself from the owner, thus described as unknown, who was a woman, by falsely representing to her that in asking her to release to him her interest in the land he was acting solely for a yacht club that owned the adjoining land, whereas he was acting for himself, and by making statements to her, which were intentionally misleading if not actually false, to the effect that, by reason of the tax sale and the expiration of the time for redemption and also by reason of a certain mortgage, she had no title to the land, and who, having procured this deed, redeemed the land from the tax sale made under R. L. c. 13, § 58, cl. 1, as being land "taxed as belonging to persons unknown," also procuring from the mortgagee a release and discharge of the mortgage on the land, has no title that upon a petition to the Land Court can be registered against the objection of the owner of the land from whom he procured his deed, because such owner has a right to avoid the deed as procured from her by false representations. *Robinson* v. *Richards*, 295.

Bill in equity against several defendants to relieve plaintiff from results of fraud and deceit alleged to have been practised upon plaintiff by one of defendants and to have been conspired in by all of them, see EQUITY JURISDICTION, 17, 18.

Mere fact, that husband caused property to be conveyed to his wife through intermediary so that it would not be exposed to hazards of his future business, is not ground for setting conveyance aside as in fraud of creditors, but where at time of conveyance husband had actual intent to contract debts and to avoid payment of them by conveyance, suit in equity may be maintained to set conveyance aside, see EQUITY JURISDICTION, 19, 20.

Executor of will has no power to ratify deed of testator made when he was of unsound mind or under undue influence, see EQUITY JURISDICTION, 21.

Fact, that seven years after making deed grantor made will which after his death was allowed, is not conclusive evidence on issues in suit in equity to set aside deed because it was procured by undue influence or fraud or was made while grantor was of unsound mind, see EQUITY JURISDICTION, 22.

Suit in equity for accounting, brought by owner of machinery against partnership, who under contract of agency had agreed to sell machinery for

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Fraud (*continued*).

plaintiff and had defrauded him, and also against corporation to which partnership assets had been transferred, where there was cross bill by corporation against defrauding partners, see EQUITY JURISDICTION, 15, 16, 29; EQUITY PLEADING AND PRACTICE, 6, 7; FRAUDS, STATUTE OF, 2.

Mere ignorance of contents of contract in writing which old foreigner was led to sign through deception practised upon him by his son was held not to be sufficient to avoid contract where other party to it did not participate in fraud, see CONTRACT, 2.

FRAUDS, STATUTE OF.

1. The provision of the statute of frauds contained in R. L. c. 74 § 1, cl. 2, requiring a memorandum in writing to prove a promise to answer for the debt of another, does not apply where there was a novation by which the promise of the defendant was accepted by the plaintiff in substitution for the promise of the original debtor and in consideration of it the plaintiff released the original debtor and looked only to the defendant for payment. *Barnett* v. *Rosenberg*, 421.
2. It is no defense to a suit in equity against a corporation to enforce on behalf of a creditor of a partnership which was the corporation's predecessor an agreement contained in a deed which was accepted by the corporation and which effected a conveyance to the corporation by the partnership of all its assets, to the effect that, in consideration of the conveyance to it, the corporation "assumes and covenants" to pay all the debts and liabilities of the partnership, that, because the corporation neither signed nor sealed the deed and it was not a contract to be performed within a year, the covenant was unenforceable because of the statute of frauds, R. L. c. 74, § 1, cl. 2, 5, the corporation having accepted and retained the property conveyed. *Forbes* v. *Thorpe*, 570.
3. In an action for the value of services as a salesman, rendered by the plaintiff to the defendant, the defendant filed a declaration in set-off for a sum largely in excess of the amount claimed by the plaintiff. At the trial the items of the declaration and of the declaration in set-off were conceded to be true, and the plaintiff contended and, without objection on the part of the defendant, introduced evidence tending to show that he had made an oral agreement with the defendant by which his salary as salesman was increased during a certain period of a number of years then passed, the increase being applied in payment of the amount claimed in the declaration in set-off. The defendant contended that the agreement, not being in writing, was void because of the statute of frauds. *Held*, that under the circumstances the statute could not be relied on and did not operate to prevent the plaintiff from receiving, for services which he had rendered under the agreement, the discharge of the defendant's claim, although such an agreement had not been made in writing. *Ridenour* v. *H. C. Dexter Chair Co.* 70.

FRAUDULENT CONVEYANCE.

See EQUITY JURISDICTION, 19, 20.

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GARAGE.

Maintenance upon certain land of automobile garage was held not to be prohibited by restriction in deed against maintenance of stable, but to be prohibited by restriction against maintenance on land of any building except "usual outbuildings appurtenant" to dwelling house of certain class, see EQUITABLE RESTRICTIONS, 2, 3, 5, 7.

GRADE CROSSING.

1. One, whose land suffers injury from the manner in which a certain conduit is constructed by a railroad corporation under a decree in proceedings for the abolition of a grade crossing, is not entitled to be heard in such proceedings and has no standing to enforce the abolition decree, if the damage of which he complains was not of a different kind from that suffered by the public. *Dwyer* v. *New York, New Haven, & Hartford Railroad*, 419.

Various rulings with regard to petition by lessee for damages resulting from acts done in abolition of grade crossing of railroad with private way, see DAMAGES, 2–6; PRACTICE, CIVIL, 19–22; LANDLORD AND TENANT, 1; EMINENT DOMAIN, 3.

GUARANTY.

1. A master, to whom was referred a suit in equity by a wholesale dealer in shoes against the signer of a certain alleged guaranty, seeking equitable relief, found that, upon the defendant's son, a customer of the plaintiff, becoming in arrears in the payment of his account, the plaintiff stated to him "that his account must be protected and that unless he could get it guaranteed by a responsible person the plaintiff would have to close it," and "that to make his account good it must be changed to a consigned account and his present indebtedness guaranteed"; that the son communicated to the defendant the plaintiff's statement; that thereupon the defendant signed and delivered to the plaintiff an instrument in writing as follows: "For valuable considerations, I hereby guarantee full and complete payment to the" plaintiff "of all debts now owed or to be owed in the future by" the son "to the" plaintiff; that there was no evidence that thereafter any goods were sold to the son on open account. *Held*, that the guaranty could not be enforced because of lack of a consideration running from the plaintiff to the defendant, it not appearing that any continued credit was given to the son or that any proceedings against the son were forborne at the defendant's request. *Atlas Shoe Co.* v. *Bloom*, 563.

HIGHWAY.

Cases involving various questions relating to public ways, see TAX, 5, 6; NUISANCE, 1, 2; NEGLIGENCE, 20, 37, 38; PRACTICE, CIVIL, 11; EVIDENCE, 3.

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HOMICIDE.

Indictment.

1. Upon an indictment for the murder of a deputy sheriff when he lawfully was attempting to arrest the defendant, it is not necessary in order to prove this crime for the indictment to allege that the person killed by the defendant was a deputy sheriff, because the crime charged is murder, and one way of proving that the killing amounted to murder is to show that the deceased was a deputy sheriff who was killed by the defendant when lawfully proceeding to arrest him. *Commonwealth* v. *Phelps*, 396.

What constitutes Murder.

2. A peace officer, who upon statements made to him by others has reasonable grounds to suspect and does suspect that a felony has been committed and that a certain person was guilty of it, lawfully may arrest such person without a warrant, and if the person thus reasonably suspected kills the officer in resisting the arrest he is guilty of murder. *Commonwealth* v. *Phelps*, 396.
3. At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, if it is shown that the deputy sheriff was informed by a person, who had seen the events which he described, that a certain factory superintendent had discharged the defendant and that later the defendant, meeting the superintendent and the witness, had drawn a knife and had stabbed the superintendent, the witness illustrating the defendant's action by putting his hand in his pocket and drawing it out in such a way as to show that the knife was open in the defendant's pocket and that the "drawing and striking were practically one movement," that the witness further told the deputy sheriff that immediately after stabbing the superintendent the defendant said, "I have got you," which the jury were warranted in finding meant "I have killed you," and that the witness also told the deputy sheriff that he had seen the doctor who had said that "the wound was three to three and one half inches deep, by an inch and a half wide, that it had affected the breathing some but that he thought he would recover," this authorizes a finding that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed the superintendent with intent to commit murder and thus had committed a felony, and that accordingly the defendant had killed the deputy sheriff in resisting a lawful arrest. *Ibid.*

Evidence.

4. At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, the Commonwealth may show that at about half past six or seven o'clock on the evening previous to the death of the deputy sheriff, who was killed by the defendant early the next morning, the witness telephoned to the deputy sheriff at a place ten miles away and told him that the defendant "had

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knifed" a certain superintendent who had discharged him, and asked the deputy sheriff "to come and look after him, take care of him," that at about eleven o'clock that same night the witness saw the deputy sheriff and told him that the defendant drew a knife and stabbed the superintendent and that he said after stabbing him, "I have got you," that the witness also told the deputy sheriff that he saw the doctor who attended the superintendent, and that the doctor told him that the wound was from three to three and one half inches deep by an inch and a half wide, that it "had affected the breathing some" but that the doctor "thought he would recover." *Held*, that the evidence was competent to show what facts had been communicated to the deputy sheriff on which he had acted in attempting to arrest the defendant without a warrant. *Commonwealth* v. *Phelps*, 396.

5. At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, where there was evidence that the deputy sheriff had been called by telephone from a place ten miles away to come and look after the defendant because he "had knifed" a certain superintendent who had discharged him, the Commonwealth was allowed to show that on his arrival at the place to which he had been called the deputy sheriff said "Si [the defendant] is at it again," the judge instructing the jury that this statement could not be used by them to draw any inferences of fact that any act had been done by the defendant, but only to show the state of mind of the deputy sheriff at the time, with a view to any light it might throw upon his action in connection with his proceedings in making the arrest. *Held*, that the evidence was admissible to prove that the deputy sheriff suspected that the defendant had committed a felony. *Ibid.*

6. At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, where there was evidence that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed a certain superintendent with intent to commit murder, the defendant, in objection to a certain portion of the judge's charge, contended that there was no evidence on which the jury could find that the deputy sheriff had been told that a dangerous wound had been inflicted. A witness testified that he informed the deputy sheriff of the stabbing and told him that the doctor had said to the witness that the wound was "three to three and one half inches deep, by an inch and a half wide, that it had affected the breathing some but that he thought he would recover." *Held*, that whether the statement was one that the wound was dangerous depended largely upon the emphasis put upon the different words used, and that, as emphasis might have been put by the witness on the word "but" and the word "thought" in referring to the expression of opinion by the doctor, this court could not say that the judge was wrong in allowing the jury to find that on the communication made to him the deputy sheriff was warranted in suspecting that a wound had been inflicted which was likely to result in death. *Ibid.*

7. At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, where there

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was evidence that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed a certain superintendent with intent to commit murder and had summoned a posse of six persons to assist him in arresting the defendant at his house, of which the front door finally was broken in, one of these assistants, in narrating as a witness what took place before the deputy sheriff and two of the posse broke in the front door, testified on his cross-examination that the deputy sheriff placed two men at the back door and said, "The rest of us will go to the front and break in the door," and that the witness considered himself one of "the rest" referred to and went to the front door. The counsel for the defendant then asked this question: "That was the only invitation you had?" to which the witness answered, "He swore us in on the way up, you understand." The defendant asked to have the question and answer stricken out on the ground that the answer was non-responsive, and excepted to a ruling of the presiding judge allowing it to stand. *Held*, that the question might have been understood to ask whether the remark of the deputy sheriff was not the only invitation or authority that the witness and the others had from the deputy sheriff to act with him in making the arrest, and that thus understood the answer of the witness was responsive to it. *Commonwealth* v. *Phelps*, 396.

8. At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, there was evidence that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed a certain factory superintendent with intent to commit murder. There also was evidence that the defendant in fact stabbed the superintendent with murderous intent, but after the close of the evidence and of the arguments the district attorney, for the purpose of showing the right of the deputy sheriff to arrest the defendant, elected to rely only on the suspicion of the officer on reasonable grounds that the defendant had committed a felony, and consented to an instruction by the judge that there was no evidence that the defendant made an assault on the superintendent with intent to kill. During the trial, and before the district attorney had changed his position, the knife with which the defendant had stabbed the superintendent was admitted in evidence and was marked as an exhibit. The defendant excepted to its admission. When the other exhibits were sent to the jury room the knife was sent with them, and the defendant at that time made no objection. The jury found the defendant guilty of murder, and the defendant argued his exception to the admission of the knife in evidence, objecting to its having gone to the jury as an exhibit when it no longer was material. *Held*, that the knife properly was admitted in evidence, being material evidence at the time it was admitted, and that the defendant, not having made any objection when it was sent to the jury room, could not complain thereof. *Ibid.*

Conduct of Trial.

Requests and rulings.

9. At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, there

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was evidence that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed a certain superintendent with intent to commit murder. There also was evidence warranting a finding that the defendant in fact stabbed the superintendent with murderous intent. The Commonwealth until the evidence was concluded relied on each of these grounds as authorizing the deputy sheriff to arrest the defendant without a warrant. At the close of the evidence the defendant's counsel asked the presiding judge to rule that there was no evidence that a felony had been committed. The judge refused to make this ruling. Thereupon the case was argued and the jury was charged, on the assumption that there was such evidence. At the conclusion of the charge, there was a conference of counsel, and the presiding judge, "the district attorney consenting," charged the jury that there was no evidence that the defendant made an assault on the superintendent with intent to kill, and that the Commonwealth's case in regard to the deputy sheriff proceeding without a warrant then rested solely upon the testimony in regard to the deputy sheriff's suspicion that a felony had been committed, and said to the jury, "You may disregard all the evidence relative to the assault by the defendant upon [the superintendent] except so far as it appears in evidence that the facts in relation thereto were communicated to" [the deputy sheriff]. During the trial and before the district attorney had elected not to press his contention that a felony had been committed, the judge had refused a request of the defendant to order all the evidence in regard to the assault by the defendant on the superintendent stricken from the record except so far as it appeared that the facts had been communicated to the deputy sheriff, and the defendant had excepted to the refusal. *Held*, that the exception must be overruled, because the ruling was right at the time it was made, the evidence having warranted a finding that the defendant had made the assault on the superintendent with intent to commit murder. *Commonwealth* v. *Phelps*, 396.

Judge's charge.

10. At the trial of an indictment for the murder of a deputy sheriff, named H, when he was attempting to arrest the defendant without a warrant, where there was evidence warranting a finding that the defendant shot the deputy sheriff with express malice as properly defined by the presiding judge in his charge to the jury, the judge instructed the jury as follows: "If, without warning or notice to H to desist, the prisoner, in cool blood, with express malice in his heart, to gratify feelings of ill will, or hatred, or any feeling which the jury find was express malice, intentionally shot and killed H, you will be warranted in finding the defendant guilty of murder, even though H was acting without right and unlawfully in attempting to make the arrest without a warrant." *Held*, that the instruction was correct and properly was given to the jury. *Commonwealth* v. *Phelps*, 396.

11. At the trial of an indictment for the murder of a deputy sheriff when he was attempting to arrest the defendant without a warrant, where there

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was evidence that the deputy sheriff suspected on reasonable grounds that the defendant had stabbed a certain superintendent with intent to commit murder, the defendant excepted to a part of the charge of the presiding judge which was as follows: "Where a dangerous wound is inflicted, which proves to be a felony through the death of the person wounded, the peace officer is not required to wait until the fact is ascertained whether the assaulted person dies or not. But if, as a reasonable man, he has a suspicion and probable cause to believe that the wound is of such a nature that a felony is likely to result from it through the death of the person wounded, then a condition exists upon which the jury, if they believe the facts, would be justified in finding the officer had probable cause to believe a felony had been committed, because, if the man dies of the dangerous wound, the criminal act dates from [the] time the act was done, and the felony, if ever committed, is committed when the wound is inflicted." *Held*, that this is a correct statement of the law. *Commonwealth* v. *Phelps*, 396.

Exhibits given to jury.

As to allowing jury to take to jury room evidence bearing on point waived by Commonwealth, defendant not objecting, see *ante*, 8.

HUSBAND AND WIFE.

1. Under the statutes of this Commonwealth, if a widow does not waive the provisions of her husband's will, she loses the right of dower unless it plainly appears by the will that the testator intended such provisions to be in addition to dower, and, where a widow thus has lost her right of dower by not waiving the provisions of the will, the law regards her as standing in the position of a purchaser for a valuable consideration and entitled to receive the whole of the sums given to her by the will in preference to other legatees. *Pope* v. *Pope*, 432.
2. A wife may take and hold by transfer a note and mortgage upon which her husband is primarily liable, without extinguishing either, and, while she cannot herself enforce such obligations against her husband during his life, she may transfer them without consideration to a third person who in his own name can enforce them at her request. *Crosby* v. *Clem*, 193.
3. A wife at the request of her husband paid the purchase price of a stock of merchandise conveyed to him. Thereafter, differences arising between them, the husband paid to the wife a certain amount of money and executed and delivered to the wife's brother a promissory note for the entire amount previously advanced by her, and, to secure the note, a mortgage on the merchandise and additions that had been made thereto. The brother immediately indorsed the note in blank, executed an assignment of the mortgage and delivered the note, the mortgage and the assignment to the wife, who retained them for a year and two months and then without consideration delivered the note and assigned the mortgage to the brother, who began foreclosure proceedings. The husband brought a bill in equity to enjoin the foreclosure. *Held*, that the bill must be dismissed, it being of no consequence under the circumstances that, immediately

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upon the delivery of the note and mortgage by the husband to the brother, the brother transferred them to the wife, or that the note was made for a past consideration. *Crosby* v. *Clem*, 193.

Attempt by husband to assign rights in policy which his wife had procured upon his life, which was ineffectual because under circumstances he had no rights to assign; but assignment by wife of her rights under same policy was held to be valid, see INSURANCE, 3, 4.

Mere fact, that husband caused property to be conveyed to his wife through intermediary so that it would not be exposed to hazards of his future business, is not ground for setting conveyance aside as in fraud of creditors, but where at time of conveyance husband had actual intent to contract debts and to avoid payment of them by conveyance, suit in equity may be maintained to set conveyance aside, see EQUITY JURISDICTION, 19, 20.

ICE AND SNOW.

Action against owner of building, eaves on bay window of which overhung sidewalk so that drippings therefrom made ice on sidewalk upon which plaintiff slipped and fell, see NEGLIGENCE, 87; NUISANCE, 1, 2.

INHERITANCE TAX.

See TAX, 7–16.

INSANE PERSON.

Executor of will has no power to ratify deed of testator made when he was of unsound mind or under undue influence, see EQUITY JURISDICTION, 21.

Fact, that seven years after making deed grantor made will which after his death was allowed, is not conclusive evidence on issues in suit in equity to set aside deed because it was procured by undue influence or fraud or was made while grantor was of unsound mind, see EQUITY JURISDICTION, 22.

It is province of master, before whom is being tried suit to set aside conveyance on grounds of grantor's unsoundness of mind and of undue influence of defendant upon him, to fix limit of time relating to which evidence of grantor's mental condition will be received, see EVIDENCE, 8.

INSURANCE.

Life.

What State law governs.

1. Where a policy of life insurance, issued by a corporation organized under the laws of another State, was applied for and delivered in this Commonwealth, the premiums all were paid here, the insured and the beneficiary both lived here, and the insurance company did business here, the contract of insurance contained in the policy is to be construed and the rights of the parties are to be ascertained by the law of Massachusetts, although the insurance money to be paid upon the death of the insured is to be paid at the home office of the company in the foreign State. *Wilde* v. *Wilde*, 205.

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Insurance (*continued*).

Surrender value.

2. *It seems*, that, where a policy of life insurance contains no provision for a settlement before the death of the insured and no such provision is made a part of the policy by any statute of the State under the laws of which the company that issued the policy was incorporated, there can be no right to surrender the policy to the company before the death of the insured and receive in exchange its value at that time, and such a policy can be given a cash surrender value only by an agreement of the insurance company to pay for the policy if properly surrendered. *Wilde* v. *Wilde*, 205.

Assignment.

3. Where by the terms of a policy of life insurance, which is taken out by a wife on the life of her husband, the amount of the insurance is to be paid to the wife or her assigns within ninety days after proof of the death of her husband, or, if the wife shall die before her husband, the amount of the insurance is to be paid to their children on like proof of death, and where by the terms of the policy no right is reserved to the insured to change the beneficiary with the consent of the company or to surrender the policy at his option for its value in cash, the husband whose life is insured has no pecuniary interest in the policy which he can assign. *Wilde* v. *Wilde*, 205.

4. In a suit in equity by the assignee of the rights of a beneficiary under a policy of life insurance, the plaintiff sought to enforce such alleged rights. It appeared that the plaintiff's assignor was a married woman, who had taken out the policy on the life of her husband, which was made payable to her upon her husband's death if she survived him, or, if she died before him, was made payable to their children, that by the terms of the policy no right was reserved to the insured to change the beneficiary with the consent of the company or to surrender the policy at his option for its value in cash, that the plaintiff's assignor, after making the assignment, had died and that her husband and her children still were living. *Held*, that by the assignment the plaintiff acquired the interest of the wife in the policy, which was contingent on her surviving her husband, and that on her death during her husband's lifetime the whole beneficial interest in the policy passed to the children of the insured, whose rights could not be affected by the assignment made by their mother; so that the bill must be dismissed. *Ibid.*

Liability.

Constitutionality, in proposed statute, now St. 1911, c. 751, relating to compensation for injuries to or death of employees resulting from accidents incident to employment, of provision relating to right of liability insurance companies to insure against liability to pay compensation provided for in act, see WORKMEN'S COMPENSATION ACT, 6.

INTEREST.

Computing of interest upon tax upon successions and inheritances, see TAX, 9.

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INTERSTATE COMMERCE ACT.

Case determining that liability of carrier for loss of baggage of passenger is not limited by schedule of rates, fares and charges filed with interstate commerce commission, in absence of knowledge of passenger, see CARRIER, 4–6.

INVITED PERSON.

Actions against railroad corporations for personal injuries, where plaintiffs were not allowed to recover because when they were injured they were on defendants' premises, not as invited persons, but at most as licensees, and there was no evidence of corporate negligence of defendants or of wanton or reckless misconduct of defendants' employees, see NEGLIGENCE, 3, 41.

JOINT TENANTS AND TENANTS IN COMMON.

1. Where one tenant in common of land wrongfully has ousted his co-tenants, his liability to them to account for his occupation is the same whether he occupied the property in person or received rent for it from others. *Brown* v. *Brown*, 388.
2. The rule, that the occupation of land by one tenant in common is not adverse to his co-tenants and creates no liability to them, does not apply where one co-tenant wrongfully has ousted the others and has compelled them to resort to the courts to establish their rights. *Ibid.*

JOINT TORTFEASORS.

1. If an employee of a mill corporation receives fatal injuries by reason of a defect in a car which a railroad corporation owns and has delivered to the mill corporation under an arrangement between them, and the existence and failure to discover the defect are due both to negligence of the mill corporation and of the railroad corporation, separate actions may be maintained for such injuries and death respectively against the mill corporation at common law and under St. 1909, c. 514, Part I. §§ 127, 128, and against the railroad corporation at common law and under St. 1906, c. 463, Part I. § 63, St. 1907, c. 392, although there can be only one satisfaction in damages; and a jury may be permitted to find a verdict in the action against the mill corporation of $3,300 for the death and $200 for conscious suffering; and a verdict of $6,300 in the action for death against the railroad corporation. *D'Almeida* v. *Boston & Maine Railroad*, 81.

Bill in equity against several defendants to relieve plaintiff from results of fraud and deceit alleged to have been practised upon plaintiff by one of defendants and to have been conspired in by all of them, see EQUITY JURISDICTION, 17, 18.

Action against employer to recover for injury to employee caused by negligence of employer in furnishing him with horse known to employer to be dangerous, where it was held that fact that fellow employee's negligence contributed to injury did not bar recovery against employer, see NEGLIGENCE, 17.

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JUDGMENT.

1. A decree of a court of another State for the payment of a fixed sum of money found to be due and payable at the date of the decree to a wife for the past support of herself and her minor child is to be regarded, *prima facie* at least, as a final decree, although an order for future payments as a provision for future support, being liable ordinarily to modification at any time, is subject to the control of the court which made the order and so is not a final order for the payment of a fixed sum. *Wells* v. *Wells*, 282.
2. A court of Michigan having jurisdiction of the parties in chancery proceedings granted a divorce to a wife and ordered that the husband pay her a certain fixed sum each month for five years "as permanent alimony," that during a part of the year a minor child of the parties should be with his mother and during the rest of the time with a grandmother, the mother of the husband, and that, while the child was with the grandmother, the husband should pay for his support. The husband became in arrears in the payment of the fixed alimony and, the grandmother dying, the wife took exclusive custody of the child and paid out sums for his support. Thereupon, over two years after the original decree of divorce, upon petition of the wife, the Michigan court made a decree determining the amount of alimony due in arrears, "allowing" a certain sum to the wife "for schooling and medical attendance upon said child . . . to this time" and ordering execution against the husband for both sums, and the wife brought an action upon the decree in this Commonwealth, at the hearing of which by a judge without a jury the statutes of Michigan and decisions of the Supreme Court of Michigan were introduced in evidence, as well as testimony of a qualified expert that the decree of the Michigan court was a "final decree." The judge found for the plaintiff, and this court, after a review of the evidence including the decisions of the Michigan Supreme Court, *held*, that the finding was warranted by the evidence. *Ibid.*
3. A court of Michigan having jurisdiction of the parties in chancery proceedings granted a divorce to a wife and ordered that the husband pay her a certain fixed sum each month for five years "as permanent alimony," that during a part of the year a minor child of the parties should be with his mother and during the rest of the time with the grandmother, the mother of the husband, and that, while the child was with the grandmother, the husband should pay for his support. The husband became in arrears in the payment of the fixed alimony, and, the grandmother dying, the wife took exclusive custody of the child and paid out sums for his support. Thereupon, over two years after the original decree of divorce, upon petition of the wife, the Michigan court made a decree determining the amount of alimony due in arrears, "allowing" a certain sum to the wife "for schooling and medical attendance upon said child . . . to this time" and ordering execution against the husband for both sums, and the wife brought an action upon the decree in this Commonwealth, at the hearing of which by a judge without a jury it appeared that the only notice to the defendant of the pendency of the petition for the decree which was the subject of the action in this Commonwealth was by a

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notice to one who had been his counsel in the original divorce proceedings, and there was undisputed evidence introduced by the defendant that, immediately after the original decree in the divorce proceedings, the authority of such counsel had been terminated, although his appearance had not been withdrawn from the court docket. There was testimony of a qualified expert for the plaintiff as to the law of Michigan, which was controverted, that "in a case in chancery an appearance continued indefinitely." The judge ruled that, "upon the undisputed evidence in the case, the decree of the Michigan court . . . is entitled to full faith and credit under the United States Constitution." The defendant alleged exceptions and contended that on the undisputed evidence there was no proper service upon the defendant of notice of the petition upon which the decree sued on was based. *Held*, that the petition was not a new or original proceeding, but was incidental to the original divorce suit, and that, the defendant having been properly before the court originally, no further personal service upon him was necessary, and that, on the evidence before him, the trial judge was warranted in finding that the defendant had sufficient notice of the petition in the Michigan court. *Wells* v. *Wells*, 282.

Evidence of judgment of another State, see EVIDENCE, 9.

Determination of who were parties and privies to certain suit in equity so as to be bound by decree therein, see EQUITY JURISDICTION, 6, 7.

Denial, for want of jurisdiction, of motion to have judgment in action at law vacated because false and fraudulent witness certificates were filed, was held not to be adjudication of question as to whether the certificates were false and fraudulent, see ATTORNEY AT LAW, 3.

Decree of Probate Court allowing accounts of administrator of estate and ordering distribution, where there was no reference in proceedings to inheritance tax and no provision was made for its payment and Commonwealth was not made party to proceedings, is no defense to information by Attorney General seeking to collect that tax, see TAX, 11.

Allowance of final accounts of administrator with will annexed and of trustee under will was held not to preclude Commonwealth thereafter from claiming succession and inheritance tax under St. 1891, c. 425, as amended by St. 1902, c. 473, see TAX, 10.

JURY AND JURORS.

As to isolation of jurors in criminal trial, see PRACTICE, CRIMINAL, 4.

Determination of what questions shall be asked of jurors besides those presented in R. L. c. 176, § 28, is discretionary with presiding judge, see PRACTICE, CRIMINAL, 8.

LABOR.

Employment of Children.

Civil liability to child injured by infringement of statute.

1. Any person, who suffers special damage from the infraction of St. 1909, c. 514, §§ 56, 61, which in substance prohibit the employment in any factory, workshop or mercantile establishment of a child under fourteen

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years of age and impose a heavy penalty upon any one who participates in his employment, has a right of action against the violator of the statute. Per RUGG, J. *Berdos* v. *Tremont & Suffolk Mills*, 489.

2. If a child under fourteen years of age is injured in a factory whose proprietor has employed him in violation of St. 1909, c. 514, §§ 56, 61, which in substance prohibit the employment in any factory, workshop or mercantile establishment of a child under fourteen years of age and impose a heavy penalty upon any one who participates in his employment, and he can trace his injury to the breach by his employer or his servants or agents of the duty imposed by the statute as its direct and proximate cause, he has a right of action against his employer. *Ibid.*

3. At the trial of an action by a child under fourteen years of age against the proprietor of a cotton mill for personal injuries received in the mill and alleged to have been caused by a violation on the part of the employer of St. 1909, c. 514, §§ 56, 61, prohibiting employment of a child of that age, there was evidence that at the time of the injury the plaintiff had been in this country about seven weeks, of which four weeks had been spent in the employ of the defendant, that he never before had worked in a factory or mill, that he could not speak or read the English language, that while waiting for his work, which was about spinning mules, he had stood with his back toward some gears covered by a guard or shield, on which one of his hands rested, that in some way that hand got beyond or under the guard and was injured and that no instruction or warning as to such a danger had been given to him. *Held*, that there was evidence which would warrant a jury in finding that the breach by the defendant of the duty imposed by the statute was a direct and contributing cause of the injury to the plaintiff. *Ibid.*

Infringement of statute by child not bar to his recovery.

4. The mere fact that a child under fourteen years of age asked for employment in a mill does not preclude him from recovering from his employer, in case his employer, in violation of St. 1909, c. 514, §§ 56, 61, employs him, for any injury which he receives in the course of his employment and while he is in the exercise of due care and of which the employer's violation of the statute is a direct and contributing cause. *Berdos* v. *Tremont & Suffolk Mills*, 489.

Due care of child necessary to recovery.

5. In an action against the proprietor of a mill by a child, who, while under fourteen years of age, was employed in the mill in violation of St. 1909, c. 514, §§ 56, 61, which prohibit the employment in a mill, workshop or mercantile establishment of a child so young, and received injuries whose proximate cause was the violation of the statutory duty of his employer, the plaintiff in order to recover must prove that at the time of the injury he was in the exercise of due care, and his recovery is barred in case negligence on his part contributed to cause his injuries. *Berdos* v. *Tremont & Suffolk Mills*, 489.

6. At the trial of an action by a child against the proprietor of a cotton mill for personal injuries received in the mill when the plaintiff was less than

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fourteen years of age and caused by a violation on the part of his employer of St. 1909, c. 514, §§ 56, 61, prohibiting employment of a child of that age, there was evidence that at the time of the injuries the plaintiff had been in this country about seven weeks, of which four weeks had been spent in the employ of the defendant, that he never before had worked in a factory or mill, that he could not speak or read the English language, that while waiting for his work, which was about spinning mules, he had stood with his back toward some gears covered by a guard or shield, on which one of his hands rested, and that in some way that hand got beyond or under the guard and was injured. No instruction or warning as to such a danger had been given to him. *Held*, that the question, whether the plaintiff was in the exercise of due care, was for the jury. *Berdos* v. *Tremont & Suffolk Mills*, 489.

No "assumption of risk" as incident to illegal contract of employment.

7. In an action against the proprietor of a mill by a child under fourteen years of age, whom the defendant, in violation of St. 1909, c. 514, §§ 56, 61, which prohibited the employment in a mill, workshop or mercantile establishment of a child so young, had employed in the mill and who had been injured by his hand being caught in some cogs which were partially exposed, the defense, that by an implied term of his contract of employment the child had assumed all obvious risks of the business, apparatus and place of his work, is not open to the defendant, because, the contract of employment being prohibited by the statute, the defendant cannot be permitted to show the alleged contract and his own consequent criminal guilt in order to interpose a defense. *Berdos* v. *Tremont & Suffolk Mills*, 489.
8. In an action of tort for personal injuries against the proprietor of a mill by a child under fourteen years of age, whom the defendant, in violation of St. 1909, c. 514, §§ 56, 61, which prohibit the employment in a mill, workshop or mercantile establishment of a child so young, had employed in a mill, no defense is open to the defendant which has for its foundation a term or provision of the illegal contract of employment, but if a defense of so called "assumption of risk" on the part of the plaintiff is in the nature of a contention that the plaintiff's own negligence contributed to cause his injury, or that he was lacking in due care, such a defense is not affected by the statute. *Ibid.*

LACHES.

See EQUITY JURISDICTION, 1, 3, 4.

LAND COURT.

Contentions not relied on in Land Court, or in Superior Court at trial of jury issues on appeal from Land Court, and inconsistent with contentions there made, cannot be urged on exceptions to this court, see WAY, 8.

Title to certain land which was procured by false and fraudulent representations could not be registered by Land Court against objection of person from whom title was procured, see FRAUD, 1.

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LANDLORD AND TENANT.

Assignment of Lease.

Suit in equity, which could not be maintained for specific performance of alleged oral promise to assign lease because such assignment would violate covenant of lease and to compel it would be nugatory and inequitable, also was held not to be maintainable to cause defendant to be declared to be holding lease in trust for plaintiff, see EQUITY JURISDICTION, 11, 12.

Lease for more than Seven Years.

Person, who enters into contract to purchase land not knowing that land is subject to unrecorded lease for term exceeding seven years and who before consummation of purchase learns of lease but completes purchase nevertheless, is not in position of purchaser of land for value without notice of lease, but takes land subject to it, and cannot compel lessee who sues to establish his rights to reimburse him to any extent, see EQUITY JURISDICTION, 23, 24.

Option to renew Lease.

1. An option, giving to the lessee of real estate a right at his election to buy the fee at any time during the term of the lease, although it adds to the value of the lessee's rights under the lease, is no part of the lessee's estate in the land, but is merely a contract right. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 298.

While option, contained in lease of real estate, giving to lessee privilege of purchasing leased premises during term of lease, is not any part of leased premises so that its value could be considered in assessing damages for injury to leased premises through acts done in abolition of grade crossing of railroad with adjacent private way, but is mere contract right, lessee has another remedy, see DAMAGES, 5; EMINENT DOMAIN, 8.

LAW OF THE ROAD.

Violation of law of road as evidence of negligence, see PRACTICE, CIVIL, 11.

LEGACY.

See DEVISE AND LEGACY.

LIMITATIONS, STATUTE OF.

See EQUITY JURISDICTION, 2–5.

LITERARY, BENEVOLENT, CHARITABLE OR SCIENTIFIC INSTITUTION.

Exemption from taxation of equitable interest of such institution in fund held in trust for it, see TAX, 17.

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MARRIAGE AND DIVORCE.

Principles which govern determination of question, whether decree of court of another State for payment of alimony in divorce proceedings is final so that it may be subject of action of contract here, application thereof, and evidence to prove such decree, see JUDGMENT, 1–8; EVIDENCE, 9.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY.

MASTER IN CHANCERY.

See EQUITY PLEADING AND PRACTICE, 8–12; EVIDENCE, 8; UNFAIR COMPETITION, 2.

MEMORIAL.

Presentation and recording of memorial of Mr. Justice Lathrop, 613.

METROPOLITAN PARKS DISTRICT.

Powers of commissioners to apportion expenses of Metropolitan Parks District in regard to apportionment of expenses of Charles River Basin and removal of Craigie Bridge, finality of their determinations, extent of their discretion and propriety of certain of their awards, see COMMISSIONERS TO APPORTION EXPENSES OF METROPOLITAN PARKS DISTRICT, 1–3.

MILK.

What is Milk.

1. The word "milk," as used in R. L. c. 56, § 55, making it unlawful to have in one's possession with an intent to sell "milk to which water or any foreign substance has been added," means whole or natural milk of the cow. *Commonwealth* v. *Boston White Cross Milk Co.* 30.
2. The word "milk," as used in R. L. c. 56, § 55, making it unlawful to have in one's possession with an intent to sell "milk to which water or any foreign substance has been added," means the normal unchanged secretion of the mammary glands of one or more healthy cows, containing not less than twelve and fifteen one-hundredths per cent of milk solids, including not less than three and thirty-five one-hundredths per cent of fat. *Ibid.*

"Concentrated" Milk.

3. Since R. L. c. 56, § 55, which among other provisions makes it unlawful to have in one's possession with an intent to sell "milk to which water or any foreign substance has been added," is a penal statute, its scope is not

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to be extended beyond the natural meaning of its words, and therefore the word "milk" in the statute does not include a product called "concentrated milk" which is described as a "manufactured product made from milk as a raw material" and as "a mixture of concentrated skim and pasteurized cream," and in whose manufacture the cream was separated from the best fresh cow's milk and was subjected to a process of slow pasteurization which evaporated most of the water in it, destroyed the bacteria and made certain chemical changes which were beneficial, the skimmed milk was treated simultaneously to a process of evaporation, agitation and cooling which removed three fourths of its water, all odors of barns or cows, killed most of the bacteria and made some chemical changes which were beneficial, and the two products thus obtained then were united. *Commonwealth* v. *Boston White Cross Milk Co.* 30.

4. At the trial of an indictment charging the defendant with a violation of R. L. c. 56, § 55, in having in his custody and possession with intent to sell milk to which water had been added, evidence introduced by the Commonwealth tended to show that the defendant was adding water and cream and "concentrated skim milk" to what was called "concentrated milk," and that he had the resultant mixture in his possession with intent to sell it, and that the "concentrated milk" looked like condensed milk. The Commonwealth introduced no evidence as to the composition of "concentrated milk." The defendant contended that the "concentrated milk" was not milk within the meaning of R. L. c. 56, § 55, and put in evidence which tended to show that it was a "manufactured product made from milk as a raw material" and was "a mixture of concentrated skim and pasteurized cream," that in its manufacture the cream was separated from the best fresh cow's milk and was subjected to a process of slow pasteurization which evaporated most of the water in it, destroyed the bacteria and made certain chemical changes which were beneficial; the skimmed milk was treated simultaneously to a process of evaporation, agitation and cooling which removed three fourths of its water, all odors of barns or cows, killed most of the bacteria and made some chemical changes which were beneficial, and the two products thus obtained then were united making "concentrated milk." There was no evidence as to what generally was known or dealt with in the trade as milk, or that "concentrated milk" had come to be known in the trade as milk. Subject to exceptions by the defendant, the trial judge instructed the jury in substance that the only question for them to decide was whether the substance to which the defendant added water was milk within the meaning of the statute, that they were to decide whether that product "which has been shown here, the method of producing which has been described," was "known and treated generally in the trade as milk as it comes from the cow," that if "that product" had "acquired a standing in the trade as milk, then the statute applies to it, and the defendant is guilty for adding water to it." *Held*, that the instructions were erroneous, because, as a matter of law, if the product called "concentrated milk" was produced by the methods described in the evidence, it was not milk within the meaning of the statute. *Ibid.*

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Foreign Substance in Milk.

5. It is not an essential element of a violation of R. L. c. 56, § 55, which among other things makes it unlawful to have in one's possession with intent to sell milk to which a foreign substance has been added, that the foreign substance should have been added by the previous voluntary act of some person or persons. *Commonwealth* v. *Graustein & Co.* 38.
6. At the trial of a criminal complaint charging the defendant with a violation of R. L. c. 56, § 55, in that he had in his possession with intent to sell milk to which a certain foreign substance had been added, the jury in answer to a question submitted to them found that the foreign substance was in whole or in part soluble in milk, and thus a contention, strongly urged by the defendant, that the foreign substance was not "added" within the meaning of the statute, unless it was dissolved, was rendered immaterial; but *it was stated* that the court did not intimate that in the absence of such a finding the contention would have been considered tenable. *Ibid.*

"Concentrated" milk is not milk with foreign substance added, see *ante*, 3, 4.

Certain technical objections to proceedings at trial of corporation for violation of R. L. c. 56, § 55, prohibiting having in possession with intent to sell milk to which foreign substance has been added, see PRACTICE, CRIMINAL, 1, 2; CORPORATION, 5.

MORTGAGE.

Of Real Estate.

Construction of certain words in construction mortgage relating to time when one of instalments to be paid by mortgagee was due, see CONTRACT, 4.

Suit by beneficiaries of trust against trustees for accounting, involving justifiability of certain conduct of defendants in letting property be sold at sale in foreclosure of mortgage, see TRUST, 3.

Of Personal Property.

Wife may take and hold by transfer from third person note and mortgage of personal property upon which husband is primarily liable, and, while she cannot enforce them in her own name against husband, she can transfer them to another who can enforce them for her, see HUSBAND AND WIFE, 2, 3.

MUNICIPAL CORPORATIONS.

Officers and Agents.

1. Official duties of municipal officers involving the exercise of discretion and judgment cannot be delegated. *Brown* v. *Newburyport*, 259.
2. A vote of a city council authorizing and directing the city treasurer in anticipation of taxes "to borrow from time to time, with the approval of the committee on finance, a sum or sums" aggregating a certain amount of money, does not show an intention to confer upon the committee on finance a perfunctory commission to be exercised once for all at the be-

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ginning of the year, but places upon the members of the committee, acting upon their official responsibilities and having in view the public welfare, the duty to investigate and sanction according to their own independent judgments each separate borrowing made under the order, which duty cannot be delegated. *Brown* v. *Newburyport*, 259.

Application of above principles in case where note of city treasurer bearing certificate of approval of finance committee signed by one member in behalf of others was held invalid even in hands of *bona fide* purchaser for value, see BILLS AND NOTES, 2–5.

Questions as to construction, validity, breach, and damages resulting from breach, of bond of certain city treasurer and collector of taxes and as to liability of surety thereon, which arose in action upon bond by city, see BOND, 2–8.

At trial of action upon bond given by contractor to town, conditioned upon performance of contract which was not assignable by contractor except with assent in writing of sewer commissioners of town indorsed thereon, where it appeared that contractor had attempted to assign contract and assignee had performed some of work, but that no assent in writing to assignment had been given, evidence tending to show that board of sewer commissioners knew and did not object to contract being performed by person other than contractor named therein was held under circumstances not to be evidence that town assented to assignment of contract or waived contract's provisions, or of novation accepting assignee in place of contractor, see PRACTICE, CIVIL, 4.

Rights and Duties under Bonds of Officers and Agents.

Duty of town toward surety on bond of one contracting with town for certain construction work, see SURETY, 1, 2.

Other questions determined as to rights and duties of municipal corporation under bonds of officers and agents, see BOND, 2–8; PRACTICE, CIVIL, 4.

MURDER.

See HOMICIDE.

NAME.

1. The name of a person is the distinctive characterization in words by which he is known and distinguished from others. By RUGG, J. *Conners* v. *Lowell*, 111.

"Heirs of [certain person]" was held not to be proper designation of names of owners of certain land being sold for collection of taxes, where means were at hand for discovery of proper name, see TAX, 26.

NEGLIGENCE.

Due Care of Plaintiff.

Of child in general, see *post*, 1, 2.

Of child on highway, see *post*, 34, 35.

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Of child under fourteen years of age injured while employed in factory contrary to St. 1909, c. 514, §§ 56, 61, see LABOR, 4–6.

Of freight brakeman injured by slipping of dog which held ratchet of brake wheel, see *post*, 8.

Of employee injured while helping to pass plank from lower to upper floor of building being constructed, see *post*, 5.

Constitutionality of proposed statute, now St. 1911, c, 751, which among other things provided that, in action against employer to recover damages for personal injuries sustained by employee in course of employment or for death resulting from such personal injuries, neither contributory negligence of employee which did not amount to wilful misconduct, nor assumption of risk by him, nor fact that injury resulted from negligence of fellow servant, should be defense, see WORKMEN'S COMPENSATION ACT, 1–6.

Of person walking across street railway track in front of approaching car which he has reason to believe will stop at "dead stop" before it reaches him, see *post*, 27.

Of driver of team who, to get wagon out of rut in way, has turned horse across street railway track when he thinks only car in sight is a thousand feet away, see *post*, 30.

Of woman crossing street on dark, rainy and windy night in front of street car which she saw approaching, see *post*, 24.

Of girl twelve years of age crossing double tracks of street railway, who, becoming confused by actions of team in front of her, was struck by car which she had seen approaching from a distance, see *post*, 23.

Of person run into by street car as he was driving across street railway tracks upon broad street under elevated railway structure on rainy day, see *post*, 29.

Of traveller who stopped on crosswalk to allow team to pass and was struck by electric street car which came around corner from intersecting street without sounding gong or bell, see *post*, 22.

Of marketman passing over crosswalk of street and struck by automobile operated by inattentive driver, see *post*, 39.

Of person who, after leaving street car, passes around behind it and is struck by another car on other track, see *post*, 28.

Of traveller on highway who slipped on ice under eaves of bay window, see *post*, 37.

Due Care of Child.

1. There is no hard and fast rule that at any particular age a minor is presumed to be able to comprehend risks or to be capable of negligence. *Berdos* v. *Tremont & Suffolk Mills*, 489.

2. It is the law of this Commonwealth that the age of a child is an important, though not a decisive, factor in determining his capacity to exercise care, and that the decision of that question is not helped or hampered by any presumption of fact or of law, and it is commonly a question of fact, to be determined in each case as it arises, whether, considering his age, experience, intelligence, judgment and alertness, the particular child was capable of understanding the nature and extent of the danger in which he was placed. *Ibid.*

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Application of foregoing principles in case of child illegally employed in factory when less than fourteen years of age and injured because of such violation of statute, see LABOR, 5, 6.

Of Child on Highway.

See *post*, 34, 35.

Due Care of Plaintiff's Decedent.

Action for instantaneous death of one killed by coming in contact, while in tree, with electric light wire from which insulation had worn, where it was held there was no evidence that plaintiff's decedent when killed was in exercise of due care, see *post*, 40.

Of traveller on highway who waved his hand to acquaintance who had accosted him as he was approaching street railway track and who was struck by street car, see *post*, 33.

Licensee.

3. A boy eight years of age, who with another boy enters an empty railroad car used for the transportation of milk to fill a bag with pieces of ice by permission of an agent or manager of a milk company, that leases from the railroad corporation the premises adjoining the track on which the car is standing, and is injured by reason of the car being started suddenly by servants of the railroad corporation, is in the relation toward the railroad corporation of a mere licensee at the most, and cannot maintain an action for his injuries against that corporation in the absence of evidence of wanton or reckless conduct on the part of its servants. *Myers* v. *Boston & Maine Railroad*, 55.

Wholesale beef dealer, who was in freight yard merely by permission and not by invitation and was injured by reason of lack of ordinary care on part of engineer of locomotive engine, cannot recover from engineer's employer for injuries, see *post*, 41.

Trespasser.

Violation of statute requiring operator of automobile upon highway to be licensed is merely evidence of negligence on part of operator and does not make him trespasser upon highway, see *post*, 38.

Imputed.

Whether in certain case there was negligence of older sister in charge of child which should be imputed to child, see *post*, 35.

Employer's Liability.

Workmen's Compensation Act.

Opinion of justices as to constitutionality of Workmen's Compensation Act, now St. 1911, c. 751, see WORKMEN'S COMPENSATION ACT, 1-6.

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Liability for employment of child contrary to statute.

Action by child, employed in factory contrary to provisions of St. 1909, c. 514 §§ 56, 61, for injuries of which employment contrary to law was proximate cause, see LABOR, 1–8.

Assumption of risk by employee.

4. Statement by RUGG, J., of the meaning of the defense, "assumption of risk" by an employee, as used to denote a defense in an action by the employee against his employer for personal injuries received in the course of the employment. *Berdos* v. *Tremont & Suffolk Mills*, 489.

By brakeman of risk from using of brake whose ratchet had short tooth, see *post*, 9, 10.

Child, illegally employed in factory when less than fourteen years of age, held not to have assumed risk of certain injuries, see LABOR, 7, 8.

Assumption by man of full age, cleaning with cotton waste pump in boiler room of power house while machinery was in motion, of risk of waste being caught in machinery, see *post*, 18.

Constitutionality of proposed statute, now St. 1911, c. 751, which among other things provided that, in actions against employer to recover damages for personal injuries sustained by employee in course of employment or for death resulting from such personal injuries, neither contributory negligence of employee which did not amount to wilful misconduct, nor assumption of risk by him, nor fact that injury resulted from negligence of fellow servant, should be defense, see WORKMEN'S COMPENSATION ACT, 1–6.

Negligent act of employer in person.

5. At the trial of an action by an employee against his employer, there was evidence tending to show that, in the course of the construction of a building, a plank was being put from the first floor of the building through a hole to the second floor; that the plaintiff with others were on the first floor pushing the plank and that near the plaintiff there was a hole into the cellar which he was using reasonable care to avoid; that the defendant himself with other employees was on the second floor pulling the plank up; that, by the desire and in accordance with the intention of the defendant and partly from his exertions, those on the second floor gave the plank an unusually quick pull which caused those on the first floor partially to lose control of it so that its end swung round and knocked the plaintiff through the hole into the cellar. *Held*, that the questions, whether the plaintiff was in the exercise of due care and whether the defendant was negligent, were for the jury. *Rivard* v. *Amiot*, 227.

Notice under statute.

6. The following notice, signed by an attorney at law, was sent to the employer of one G within sixty days after G received personal injuries while at work in the course of his employment: "Gentlemen: G, who was in your employ and was very greatly injured and will probably permanently lose his eyesight, while at work on electrical appliances of the Boston Elevated Railway at Sullivan Square, and is now in the Boston

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Negligence (*continued*).

City Hospital, has placed his case in my hands for adjustment. There seems to be no doubt about the liability and certainly the injury is very great. If you wish to confer with me regarding a settlement I would be glad to see or hear from you at once. Yours very truly, M." *Held*, that the notice did not satisfy the requirements of R. L. c. 106, § 75, now St. 1909, c. 514, § 132, requiring as a condition precedent to liability of the employer under R. L. c. 106, §§ 71–74, now St. 1909, c. 514, §§ 127–131, that a "notice of the time, place and cause of the injury" should be given to the employer in writing, signed by the person injured or by some one in his behalf. *Grebenstein* v. *Stone & Webster Engineering Co.* 196.

Ways, works or machinery.

7. If a freight brakeman in the employ of a railroad company is injured because of a defect consisting of a short tooth in the ratchet on the braking apparatus of a freight car, the mere fact that such ratchets are in common use will not excuse the defendant from liability under R. L. c. 106, § 71, cl. 1, if it does not appear that the brakeman assumed the risk of the injury. *O'Brien* v. *Boston & Maine Railroad*, 65.
8. If, at the trial of an action under R. L. c. 106, § 71, cl. 1, against a railroad corporation by a freight brakeman in its employ, to recover for personal injuries caused by the sudden unwinding of a brake wheel, caused by the slipping of a dog which held the ratchet as the plaintiff was winding up the brake, there is evidence that the ratchet was defective in that one tooth was not cut in so deep as the others, which would cause the dog to be forced out and not to hold much pressure, and the plaintiff testifies that he did not see any defect in the ratchet or dog before he began using them, and there is further evidence that the plaintiff's duties were those of a member of a car-shifting crew, which required him to jump on and off cars in motion and to ride cars which had been "kicked" off from trains in train yards until, by braking them, he brought them to a standstill, the question, whether the plaintiff was in the exercise of due care, is for the jury. *Ibid.*
9. If, at the trial of an action under R. L. c. 106, § 71, cl. 1, against a railroad corporation by a freight brakeman in its employ, to recover for personal injuries caused by the sudden unwinding of a brake wheel, caused by the slipping of a dog which held the ratchet as the plaintiff was winding up the brake, there is evidence that the rachet was defective in that one tooth was not cut in so deep as the others, which would cause the dog to be forced out and not to hold much pressure, and the plaintiff testifies that he did not see any defect in the ratchet or dog before he began using them, and there is further evidence that the plaintiff's duties were those of a member of a car-shifting crew, which required him to jump on and off cars in motion and to ride cars which had been "kicked" off from trains in train yards until, by braking them, he brought them to a standstill, and it appears that ratchets with such short teeth were in common use on railroads, the questions, whether the plaintiff assumed the risk of the injury he received because he knew that the ratchet was or might be defective or because a defective ratchet was so common and well known as to

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constitute one of the obvious risks of the employment, or whether in the performance of his duties he properly could rely upon the assumption that the brake was in a condition to enable him to do his work in safety, and, if so, to what extent he was justified in acting upon such reliance, all were for the jury. *O'Brien* v. *Boston & Maine Railroad*, 65.

10. If a freight brakeman, who in the course of his duties is upon a loaded freight car which has been "kicked" from a train in its course over switches to a position in a freight yard, and whose duty it is by use of the hand brake to bring the car to a standstill at the proper point, as he starts to use the brake for the first time observes that it is defective, so that he has before him the alternative of attempting to use it, employing such care as he is able to under the circumstances, or of abandoning the car to its fate with the certainty that it would come into collision with other cars, *it is doubtful* whether it can be said as matter of law that the brakeman, in deciding to use the brake, would assume the risk of injury therefrom. By MORTON, J. *Ibid.*

11. Where, at the trial of an action under R. L. c. 106, § 71, cl. 1, against a railroad corporation by a freight brakeman in its employ, to recover for personal injuries caused by the sudden unwinding of a brake wheel due to the slipping of a dog which held the ratchet as he was winding up the brake, there is evidence that the ratchet was defective in that one tooth was not cut in so deep as the others, which would cause the dog to be forced out and not to hold much pressure, and the plaintiff's description of the manner in which the accident happened might be found to have been more consistent with the presence of a defective tooth in the ratchet than with any other cause, and there also is evidence that such ratchets are in common use on railroads, it is for the jury to say whether, in view of the way in which such ratchets are made and of their common use on railroads, the short tooth constituted a defect which the defendant in the exercise of due care and diligence ought to have discovered and remedied. *Ibid.*

12. If a mill corporation receives from a railroad corporation a car belonging to the railroad corporation and loaded with coal for the mill, and under the sole control of the mill corporation and by its employees the car is moved over tracks of the railroad corporation to tracks of the mill corporation and on to its premises, dumped, and returned to the railroad corporation, the car, during the time that it is thus in the control of the mill corporation, is a part of its appliances and of its ways, works or machinery, and that corporation is liable both at common law and under St. 1909, c. 514, Part I. § 127, cl. 1, for personal injuries received by an employee by reason of a defect in the car which could have been discovered by reasonable diligence. *D'Almeida* v. *Boston & Maine Railroad*, 81.

Joint liability of employer and railroad corporation in such case, see JOINT TORTFEASORS, 1.

As to liability of employer at common law for injuries to employees resulting from dangerous or defective machinery or appliances, or dangerous surroundings, see *post*, 18, 19.

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Superintendence.

13. Driving an automobile truck from a new factory back to an old factory, from which the driver's employer is moving, is not an act of superintendence, and if a workman of the same employer at his request is taken along, sitting on an empty basket, and is thrown out and killed owing to too great speed or careless driving, the administrator of the workman's estate cannot recover from the employer for the death of his intestate thus caused by the carelessness of a fellow workman. *Buckley* v. *Dow Portable Electric Co.* 152.

14. If the superintendent of a proprietor of teams, which are used for loading manure at a place called "the dump" and transporting it to other places, tells the driver of one of the teams to take two designated men with him to the dump and load manure, sending there also at the same time another team with two men, and if, after loading at the dump, the second team gets stuck owing to the softness of the ground, and the driver of the first team unhitches his horses, and, handling the reins himself, orders the two men sent with him each to hitch one of the horses in front of the pole horses of the other team as leaders, and, after one of the horses has been so hitched, and when the man who was told to hitch the other horse is in the act of coupling the whiffletree to the loop on that side of the pole by means of a hook and chain, the driver, who still is handling the reins, strikes that leader with his whip, whereupon the horse jumps, and the man's finger is caught between the hook and the loop or ring and is injured, in an action by the injured man against the proprietor of the teams under R. L. c. 106, § 71, cl. 2, a verdict must be directed for the defendant, because the driver, who gave the order to the plaintiff and afterwards struck the horse with the whip, was not a person "whose sole or principal duty was that of superintendence," nor was he a person who "in the absence of such superintendent was acting as superintendent with the authority or consent" of the defendant; and, if there was negligence in striking the horse with the whip, it was that of a fellow servant of the plaintiff. *Anderson* v. *Smith*, 52.

15. A mill corporation received from a railroad corporation a certain car belonging to the railroad corporation and loaded with coal for the mill, and under the sole control of the mill corporation and by its employees the car was moved over tracks to its premises to be dumped. The car was of a variety called a coal dump car, its body being arranged to tip either to one side or to the other of the car and thus to dump its contents, while, when the car was loaded, the body was held in an upright position by a combination of links, dogs, hangers and wooden floor beams. The method employed by the mill corporation's superintendent to get the car upon its premises was to start it with some speed toward a curve and then to let it go by its own momentum, a brakeman in the employ of the mill corporation being upon it so that its speed could be checked at the right moment. The superintendent knew that it was necessary that the apparatus which held the car body in place should be able to stand the lateral strain caused by the car striking the curve at speed, and that otherwise the load would be dumped and the brakemen injured. Before the car in question was

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started toward the curve the superintendent by looking at the ends of the car ascertained that the apparatus in question was in place. He did not discover that the apparatus was, as to its materials, defective and unable to stand the strain to be put upon it, facts which he would have discovered if he had made an examination of the apparatus under the car. By reason of such defects, the apparatus gave way on the curve, the car dumped its contents and the brakeman received injuries from which he died. *Held*, that such failure of the superintendent to discover the defects might be found to be negligence for which the mill corporation might be found to be liable under St. 1909, c. 514, Part I. § 127, cl. 2, § 128, for the conscious suffering and death of the brakeman. *D'Almeida* v. *Boston & Maine Railroad*, 81.

Joint liability of employer and railroad corporation in such case, see JOINT TORTFEASORS, 1.

Dangerous horse.

16. In an action by an administrator to recover from the employer of his intestate for the conscious suffering of the intestate from injuries caused by the running away of a vicious horse of the defendant while the intestate was in the wagon to which the horse was attached, in consequence of which the intestate jumped from the wagon and sustained the injuries sued for, if there is evidence on which it could be found that the horse was vicious and that the defendant knew it, that the intestate was in the defendant's employ and that the horse was furnished to the intestate by the defendant to be used in the defendant's business, that the intestate did not know that the horse was vicious and that the defendant gave him no warning or information as to the character of the horse, when such warning or information would have prevented the accident, the case is for the jury, and it is for the jury to say whether, taking all the circumstances into account, the intestate was in the exercise of due care or voluntarily assumed the risk of injury in jumping from the wagon as he did. *Berenson* v. *Butcher*, 208.

17. In an action against the plaintiff's employer for personal injuries caused by the running away of a vicious horse of the defendant while the plaintiff and another employee of the defendant were in the wagon to which the horse was attached, if there is evidence that the defendant knew that the horse was vicious and that the plaintiff did not, and that the defendant was negligent in furnishing the horse to the plaintiff and in giving him no warning or information as to the horse's dangerous character, it is no defense that just before the horse ran away the plaintiff's fellow employee had taken off the horse's bridle for the purpose of feeding him on the road, for, even if the fellow servant knew that it was dangerous to attempt to feed the horse on the road by taking off the bridle and his negligence contributed to the accident, this merely would make the fellow servant a joint tortfeasor and would not relieve the defendant from liability if the jury found against him. *Ibid.*

Dangerous or defective machinery or appliances.

18. A man of full age in the employ of a corporation, who in obedience to an order of a superintendent is cleaning a pump in the boiler room of a

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power house, while the wheels of the machine are in motion, with a piece of cotton waste which has been given him for the purpose, assumes the obvious risk of an injury from the cotton waste, and with it his hand, being drawn in between a large cog-wheel and an iron guard by the wind created by the motion of the wheel, and his employer is under no duty to warn him of such a danger. *De Angelo* v. *Boston & Maine Railroad*, 53.

Liability of mill corporation for personal injuries and death of employee caused by defect in car received by it from railroad company and in its control, see *ante*, 12.

Joint liability of employer and railroad company in such case, see JOINT TORTFEASORS, 1.

Action for personal injuries to child under fourteen years of age, illegally employed in factory, which were due to his catching hand in machinery, where it was held that there was evidence that violation of statute was proximate cause of injuries, see LABOR, 1–8.

As to statutory liability of employers for injuries to employees caused by certain defects in ways, works or machinery, see *ante*, 7–12.

Dangerous place and surroundings.

19. If a person, who has the general control of a house in process of construction, hires a laborer to work in and about the house where it is necessary for him to pass into and from the house over a plank, and the employer takes no pains to see whether the plank is suitable for the purpose, and if the plank is rotten on its under side and breaks while the laborer in the course of his employment is crossing it with a barrel of refuse, the employer is liable to the laborer for his injuries thus caused, if he was in the exercise of due care. *Lavin* v. *Jones*, 8.

Action for personal injuries to child under fourteen years of age, illegally employed in factory, which were due to his catching hand in machinery, where it was held that there was evidence that violation of statute was proximate cause of injuries, see LABOR, 1–8.

As to statutory liability of employer for injuries to employees caused by certain defects in ways, works or machinery, see *ante*, 7–12.

Fellow servant.

Act of driver of automobile truck which threw fellow employee from truck and killed him was held under circumstances to be act of fellow servant and not of superintendent, so that employer was not liable, see *ante*, 13.

Constitutionality of proposed statute, now St. 1911, c. 751, which among other things provided that, in actions against employer to recover damages for personal injuries sustained by employee in course of employment or for death resulting from such personal injuries, neither contributory negligence of employee which did not amount to wilful misconduct, nor "assumption of risk" by him, nor fact that injury resulted from negligence of fellow servant, should be defense, see WORKMEN'S COMPENSATION ACT, 1–6.

Proprietor of teams held not to be liable for certain injuries suffered by driver because horses, which he was coupling in front of other horses, were started while he was doing so, starting being act of fellow servant and not of superintendent, see *ante*, 14.

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Street Railway.

Injuries to passengers: from dynamite exploded on track.

20. In an action against a street railway corporation for injuries received, when the plaintiff was a passenger on a car of the defendant, from an extraordinary explosion of dynamite, it appeared that the accident happened at about eight o'clock on an evening late in September, that when the explosion occurred the car, if moving at all, was going not more than six or eight miles an hour, that shortly before the accident there passed over the track an express wagon, on which four pine or spruce boxes filled with sticks of dynamite had been loaded with other merchandise, that each box weighed about fifty pounds, that one of these boxes had been loaded on the top of a dry goods box, that the load was not bound perfectly and that before reaching the track another rope was used for binding, but that nothing was missed from the load at that time, that the wagon proceeded on its way and crossed the defendant's track at about the place and a few minutes before the explosion occurred, and that after the explosion the driver of the wagon discovered that the box which had been on the top of the dry goods box was gone, and only three boxes of dynamite could be found, that the car was equipped with a fender, the height of which from the ground was not fixed, but there was some evidence that its height from the ground was six inches. There was no evidence as to the manner in which the accident occurred. No person who survived saw the dynamite upon the track or observed the impact of the car upon it. *Held*, that it could not be said that a cause of the accident attributable to the negligence of the defendant had been indicated by anything stronger than a pure conjecture, and accordingly that there was no evidence for the jury of the defendant's negligence. *Bigwood* v. *Boston & Northern Street Railway*, 345.

Statement of principle determinative of foregoing, see EVIDENCE, 3.

Injuries to passengers: when leaving car.

21. In an action by a passenger against a street railway company for personal injuries caused by a box car of the defendant starting as the plaintiff was in the act of alighting, the declaration alleged as the cause of the accident that the car, "through and by reason of the negligence and carelessness of the defendant, its agents and servants, was suddenly started" as the plaintiff was in the act of alighting. At the trial of the case, there was evidence tending to show that the plaintiff, who was seventy-five years of age, asked the conductor to stop the car at a certain place and that the conductor gave a signal for that purpose, that, while the car itself was in motion, the plaintiff started for the rear door, that after the car had stopped he started to get off and, while he was doing so, a signal to start the car was given, the car started, and he was thrown; that the conductor at all times was inside the car; that there were no passengers standing inside the car and no one on the rear platform. There was no direct evidence as to who gave the signal to start the car. The presiding judge left the case to the jury with a brief charge, among other things instructing

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Negligence (*continued*).

them that in order to find for the plaintiff they must be satisfied "by a fair preponderance of the evidence that the car was suddenly started either because of the ordinary starting signal given by the conductor, or by the motorman without receiving any signal. The plaintiff would not be entitled to recover simply by showing that the car started, and nothing more." The plaintiff, without calling to the judge's attention any specific objections to the charge, excepted generally to the instructions and to rulings therein contained. There was a verdict for the defendant. *Held*, that the exceptions must be overruled, both because the evidence did not justify a finding that the starting signal by bell was given by the conductor or by his direction, and because the charge stated the law tersely and correctly. *Torrey* v. *Boston Elevated Railway*, 43.

Injuries to persons on highways: pedestrians.

32. A person, who stops on a crosswalk at the corner of two city streets to allow a team to pass him and during this momentary pause fails to look around and is struck and injured by a street car which comes around the corner from the intersecting street without sounding any gong or bell, is not necessarily negligent, and in an action against the corporation operating the street railway for his injuries thus caused, in which there is evidence of negligence on the part of the defendant, he may be entitled to have the question whether he was in the exercise of due care submitted to the jury. *Magner* v. *Boston Elevated Railway*, 60.

33. At the trial of an action by a girl twelve years of age, when injured, against a street railway corporation there was evidence tending to show that, as the plaintiff, coming from a street upon which there were no tracks, approached double tracks of the defendant upon an intersecting street, she saw a car approaching on the nearer track some distance away and that it appeared to her to be "slowing down," that she saw a heavy team approaching from the opposite direction on the farther track at a walk, that thereupon she started to cross the tracks and that she would have crossed in safety, had not the driver of the team suddenly whipped up his horses just as she reached the nearer track, upon which the street car was approaching, and that, upon the driver doing this, she became confused, hesitated and was run into by the street car. The view of the motorman of the car was unobstructed. *Held*, that the plaintiff had a right to assume that the driver of the wagon and the motorman of the car would use reasonable care to avoid running her down, and that the questions, whether the plaintiff was in the exercise of due care and whether the motorman was negligent, were for the jury. *Mullen* v. *Boston Elevated Railway*, 79.

24. In an action by a woman against a corporation operating a street railway, for personal injuries from being run into by a car of the defendant as the plaintiff was attempting to cross a public street at half past eight o'clock on an evening late in November when the rain was falling heavily and a very high wind was blowing, the plaintiff testified that she looked twice and saw the car, first when she stepped from the curbstone, which was about seventeen feet from the track, and afterwards when she was

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about half way between the curbstone and the track, that at this last time the car was about one hundred and twenty-five feet away and was approaching slowly, that she thought that she had time to get across and made the attempt. The evidence tended to show that she had got almost over the farther rail of the track when she was struck by the corner of the fender of the car. The plaintiff also testified that the street at the time of the accident was substantially deserted, there being in sight only the car which struck her and another car several hundred feet away, which was approaching from the opposite direction. *Held*, that the questions, whether the plaintiff looked as often as she ought to have looked and as late as she ought to have looked and whether she was justified in thinking that she had time to get across the track ahead of the car, as well as the questions, whether the accident was due to the failure of the motorman to diminish the speed of the car when approaching the plaintiff and whether he was negligent, were for the jury. *Albee* v. *Boston Elevated Railway*, 6.

25. If an electric street car, which is behind time, is run on a single track through the main thoroughfare of a village at a speed of about twenty-five miles an hour without sounding a gong or giving any warning of its approach, and in crossing an intersecting street runs down a traveller crossing the main street on foot, throws him a distance of ten feet from the car with such force that he rolls ten feet farther, and then continues on its way without stopping, this is evidence of gross negligence toward the traveller on the part of the motorman and the conductor of the car. *Berry* v. *Newton & Boston Street Railway*, 100.

Question of due care of traveller in such case, see *post*, 32, 33.

26. In an action for personal injuries from being run down by a street car of the defendant, the plaintiff may be asked by his counsel why he did not look before stepping on the track in front of the car that injured him, his presumed answer being a statement of his supposed knowledge that in accordance with a rule of the street railway company this car like all other cars would stop at a "dead stop" before reaching the place where he was crossing. *Ryan* v. *Boston Elevated Railway*, 292.

27. In an action for personal injuries against a corporation operating a street railway, it appeared that the plaintiff was employed by the defendant as a conductor, that before starting on his first trip on the morning of the accident he had occasion to see one of his superiors in the service at a car barn of the defendant, that, although he saw a car not very far away approaching at a speed of about two miles an hour on a track that he had to cross, he proceeded to walk along a well-worn path used by the defendant's employees which led across the track on which the car was approaching and, stepping on the track without looking, was run down by the car and injured. Between the plaintiff and the point at which he saw the car approaching was what was called a "dead stop," at which all passenger cars were stopped whether there were passengers to get on or off there or not. The plaintiff testified that, when he was receiving instructions as to his duties as a conductor, he was told by his instructor that all cars stopped at this place called the "dead stop," and that in this respect the plaintiff knew no difference between the different kinds of cars. It appeared that the car which

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struck him was not a passenger car but a money car, which was used for collecting receipts or other similar purposes. The plaintiff testified that when he saw the car he did not know what kind of a car it was, although he had an idea that it was not a passenger car. It appeared that if this car had stopped at the "dead stop" and had started again it would not have reached the place where the plaintiff crossed until a considerable time after he had passed by. *Held*, that it was a question of fact for the jury, whether the plaintiff exercised such care as persons of ordinary prudence would be expected to exercise, in relying upon his supposed knowledge that all cars approaching from the place where he saw the car that afterwards struck him would stop before reaching the place where he crossed. *Ryan* v. *Boston Elevated Railway*, 292.

28. At the trial of an action against a street railway company, there was evidence tending to show that the plaintiff, while a passenger upon a vestibuled car of the defendant upon a street where there were double tracks, and as he was about to alight therefrom, looked ahead through the vestibule, but could not determine whether a car was approaching on the other track because his view was "troubled" by the vestibule, that thereupon he alighted, stepped a "foot or so" from the car and looked forward, but that, because of the position of the car from which he had alighted, he could see no car approaching; that thereupon he passed around behind the car from which he had alighted, and, as he reached its farther side, looked thirty or forty feet up the other track and saw no car coming, that a man passed across the track just before him and showed no "signs of an approaching car," that thereupon the plaintiff "assumed that it was safe for him to cross" the other track and did so, and, when he reached the middle of the track, was struck by a car which was coming from his right past the car which he had just left at the rate of twenty-five miles an hour and upon which no warning gong had been sounded. *Held*, that the questions, whether the plaintiff was in the exercise of due care and whether the motorman was negligent, were for the jury. *Kinsley* v. *Boston Elevated Railway*, 467.

Injuries to persons on highway: in vehicles.

29. At the trial of an action against a street railway company for personal injuries due to a horse and wagon which the plaintiff was driving being run into by a car of the defendant, it was undisputed that as the plaintiff approached from a cross street a broad street, which was straight for a long way in both directions and in the middle of which the defendant maintained double surface car tracks between rows of iron pillars supporting elevated tracks, he saw a car approaching upon the tracks nearest to him from the direction in which he desired to go, and, in order to avoid crossing the tracks in front of that car, he drove along the broad street on the left hand side thereof until the car had passed, when he turned to cross both the tracks and his wagon was struck at the front axle by a car which approached from his right; that the plaintiff was familiar with the locality and was an experienced driver, and that his horse and wagon and harness were in proper condition and the wagon was loaded moderately, that there

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was a clear view down the street in the direction from which the car came and nothing to obstruct such view, and that it was raining very hard at the time. The plaintiff testified that he looked both ways and saw no car. *Held*, that on the undisputed facts there was no evidence of due care on the part of the plaintiff and that therefore the action could not be maintained. *Cokinos* v. *Boston Elevated Railway*, 225.

30. If the driver of a two-horse covered wagon, when proceeding along a highway on a winter evening at the right hand side of two parallel street car tracks, finds that the right rear wheel of the wagon has caught in a cradle hole or rut two inches deep, and, being too near the curbstone to pull out on the right, he turns his horses to the left to pull the wagon out of the hole, and if, just before he turns his horses to the left, he looks both ways on the tracks for an approaching car, sees none coming on the nearer track and on the farther track sees the headlight of a car about one thousand yards or three quarters of a mile away, and if, after two unsuccessful attempts to pull the wagon out of the hole, he rests his horses for a minute or so and then turns them still more to the left so that they make an angle of ninety degrees with the wagon and are across the nearer track, and he then stands up and urges the horses and "chases" them forward, and the horses move ahead across the farther track, and the driver then looks and sees the approaching car only eighteen feet away, moving at the rate of fourteen miles an hour, and succeeds in pulling the horses out of the way, but the car strikes the right forward wheel, throwing the driver from his high seat to the ground, in an action by the driver against the corporation operating the street railway for his injuries thus caused, where there is evidence of the defendant's negligence, he has a right to go to the jury on the question whether he was in the exercise of due care. *Keating* v. *Boston Elevated Railway*, 278.

Railroad.

31. If a railroad corporation transports a car, which it owns and which is loaded with coal, entirely on its own lines to and into the sole control of a mill corporation with the understanding that the mill corporation by its employees shall move the car over tracks to a coal pocket upon its premises, dump it and return it to the railroad corporation, the railroad corporation is liable at common law for personal injuries and under St. 1906, c. 463, Part I. § 63, St. 1907, c. 392, for the death of an employee of the mill corporation who is injured by reason of a defect in the car which would have been discovered if the car had been thoroughly inspected before it was delivered to the mill corporation. *D'Almeida* v. *Boston & Maine Railroad*, 81.

Joint liability of railroad corporation and mill corporation in such case, see JOINT TORTFEASORS, 1.

Wholesale beef dealer, who was in freight yard merely by permission and not by invitation and was injured by lack of ordinary care on part of engineer of locomotive engine, cannot recover from engineer's employer for injuries, see *post*, 41.

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Railroad corporation held not liable, in absence of wanton or reckless conduct on part of its servants, for injury to boy in empty car filling bag with pieces of ice, see *ante*, 3.

Action by freight brakeman against railroad company for personal injuries received while in defendant's employ and caused by slipping of dog which held ratchet of brake wheel, see *ante*, 7–11.

In Use of Highway.

82. A traveller on foot, who is about to cross the main thoroughfare of a village, on which, three feet from the sidewalk, is the single track of a street railway where electric cars run at stated intervals with which he is familiar, is not necessarily negligent in starting to cross the street without looking for a car which he reasonably may suppose already to have passed, but which, being behind time, is approaching at great speed and runs him down. *Berry* v. *Newton & Boston Street Railway*, 100.

83. If a traveller on foot, who, coming from an intersecting street, is about to cross the main thoroughfare of a village, on which, three feet from the sidewalk, is the single track of a street railway where electric cars run at stated intervals with which he is familiar, knowing that no car then is due from the right, looks to the right and sees no car, and, when approaching the track, is accosted by an acquaintance, to whom he waves his hand, and then passes forward behind a large tree in the sidewalk, which cuts off his view of the track on the right until he is within a step of the first rail, and, pausing for a relatively short space of time, he then goes on the track and is run down and killed by a car, which is behind time and is approaching from the right at great speed and without warning, the administrator of his estate is not necessarily precluded from recovering for the death of his intestate thus caused, the question of the due care of the intestate being for the jury. *Ibid.*

84. It is not an absolute defense to an action by a child less than four years of age against the owner of a team for injuries caused by the plaintiff's being run over by the team because of negligence of the driver that, when injured, the plaintiff was playing on a public street and was not a traveller thereon. *Dowd* v. *Tighe*, 464.

85. At the trial of an action by a girl against the owner of a team for injuries, received when the plaintiff was three years and eight months of age and due to the team backing into and running over her as she was playing in the highway, there was evidence that shortly before the accident the plaintiff and her six year old brother and a companion of his of the same age were playing in a small yard in front of her home under the care of a sister eleven years of age, with whom they had been left temporarily by her mother, that the yard fronted on the highway and that there was no gate that could be closed, that, upon the plaintiff asking her sister to get her some bread and butter, the sister went into the house to do so and was gone about three minutes, that immediately upon her departure the plaintiff's brother seized a toy shovel of the plaintiff and ran into the street, pursued by his companion, that the companion took the shovel

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from him and threw it under the defendant's wagon, that the plaintiff, pursuing, wept and, standing behind the team, was crying out for her shovel when the driver backed the team and she was run over. *Held*, that the questions, whether the plaintiff properly was upon the street unattended and, if so, whether at the time of the accident she was exercising the degree of care which under the circumstances a reasonably careful and prudent child of her age would have exercised, and if she was not properly upon the street unattended, whether there was negligence on the part of the sister in caring for her which should be imputed to her, were for the jury. *Dowd* v. *Tighe*, 464.

36. At the trial of an action by a girl against the owner of a team for injuries received when the plaintiff was three years and eight months of age and due to the team backing into and running over her as she was playing on the highway, there was evidence tending to show that before the accident an employee of the defendant who was driving the team had been waiting for an opportunity to drive from the highway into a nearby lot, that with his knowledge children had been playing around and near the team in the meantime, and that some of them had climbed upon the wagon, that, an opportunity to enter the lot occurring, he ordered the children off and then, without looking behind the team, backed it and ran over the plaintiff, who at the time was crying and calling out for a shovel which a playmate had thrown under the wagon. *Held*, that the question, whether the driver was negligent, was for the jury. *Ibid.*

37. At the trial of an action against the owner of a house abutting upon the highway for injuries alleged to have been caused by the plaintiff slipping upon a ridge of ice caused by drippings from eaves of the defendant's buildings which overhung the way, the plaintiff testified in direct examination that upon a slippery, misty morning she was approaching a store in the defendant's building by walking in a dry place close to the building as the rest of the sidewalk was covered with ice, that as she walked she looked down for five or six feet ahead of her and that there was nothing to prevent her seeing any ice that was there, that when she got opposite the door of the store she stepped upon the ridge of ice in question and fell, that the ridge of ice was not more than four or five inches wide and stood up two or three inches across the dry bricks. In cross-examination she testified that she could not account for her not seeing the ridge of ice. *Held*, that the question of the plaintiff's due care was for the jury. *Marston* v. *Phipps*, 552.

Liability of owner of building in such case, see NUISANCE, 1, 2.

Action against street railway company for injuries sustained by one who, after having left car, passed around behind it upon other track where he was struck by another car, see *ante*, 28.

Action against street railway company by woman who was run into by street car as she was crossing street in front of it on dark, rainy and windy night, see *ante*, 24.

Action by marketman against owner of automobile driven by inattentive driver for injuries caused by automobile being run into plaintiff as he was crossing street in market district, see *post*, 39.

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Action against street railway company by one who stopped on crosswalk to allow team to pass and was struck by electric car which came around corner from intersecting street without sounding gong or bell, see *ante*, 22.

Action against street railway company for personal injuries received by girl twelve years of age who, as she was crossing double tracks of defendant, became confused by actions of team in highway and was struck by street car which she had seen approaching at distance, see *ante*, 23.

Action against street railway company by person run into by street car when he was driving across tracks in broad street under elevated railway structure on rainy day, where it was held there was no evidence of due care on part of plaintiff, see *ante*, 29.

Question as to whether there was negligence on part of driver of team in putting horses across street railway track to pull wagon out of rut, when he sees street car, which he thinks is thousand feet away, approaching on track, see *ante*, 30.

In Use of Automobile.

38. In an action for injuries caused by a collision of automobiles when being driven upon a highway in opposite directions, the fact that the defendant was violating the provisions of St. 1903, c. 473, § 5, by operating an automobile upon a public highway without a license, is only evidence of his negligence in reference to his fitness to operate a car and to his skill in the actual management of it. *Bourne* v. *Whitman*, 155.

Other questions that arose at trial of same action, see AUTOMOBILE, 1–5; PRACTICE, CIVIL, 11; AGENCY, 1.

39. If a man, who is employed by marketmen in a city to deliver goods to their customers, which he carries either in bundles or on his shoulders, when returning to his place of employment after making such a delivery, has occasion to pass over a crosswalk of a public street, and before starting on the crosswalk looks in each direction and sees that everything "looks clear," and if when he is on the crosswalk he is run into and injured by a motor car, whose driver has been engaged in conversation with an occupant of the car, toward whom he has turned his head, and is giving little if any attention to travellers in front of him, the person thus injured in an action brought by him against the owner of the car, has a right to go to the jury, who are to say whether the plaintiff was in the exercise of due care and whether under the circumstances the inattention of the driver was sufficient proof of his negligence. *Lynch* v. *Fisk Rubber Co.* 16.

Proprietor of "sight-seeing automobile" was held to be bound to exercise toward passengers highest degree of care consistent with proper transaction of business, whether or not he technically was common carrier of passengers, see CARRIER, 3.

Act of driver of automobile truck which threw fellow employee from truck and killed him was held under circumstances to be act of fellow servant, and not of superintendent, so that employer was not liable, see *ante*, 13.

Sight-seeing Automobile.

Proprietor of "sight-seeing automobile" was held to be bound to exercise toward passengers highest degree of care consistent with proper transac-

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tion of business, whether or not he technically was common carrier of passengers, see CARRIER, 8.

In Use of Electricity.

40. An employee of a town in the course of his duties was in a tree within the limits of a highway destroying gypsy and brown tail moth nests. Through the tree ran three telephone wires and above them seven electric light wires, one of which, a primary wire which carried twenty-three hundred volts of electricity, had the insulation worn off from it in the tree. Before going into the tree the employee's attention had been called to the worn place on the wire. He went past and above the wire safely and, having completed his work, handed his tools down, and, as he was descending, asked a fellow workman whether the wire above described, pointing to it, "was a street light," and the fellow workman answered that he thought it was. The foreman on the ground, hearing the question and answer, told him that if it was "there is no current on." The employee then descended to a point below the wire. He was not seen alive again. Less than a minute later he was heard to groan and was found dead about a foot below the wire with his left arm extending above his head in a bent position and the inside of the tip of the third finger in contact with the wire at the place where the insulation was worn off. He was standing rigid, bent a little backward, with a spur which he wore on his right foot driven into a limb. In an action by his administrator against the electric light company which maintained the wire to recover for the death under R. L. c. 171, § 2, as amended by St. 1907, c. 375, it was *held*, without deciding whether there was evidence of negligence on the part of the defendant that there was no evidence to warrant a finding that the employee was in the exercise of due care when he was killed, the manner of his death being left a matter of conjecture. *Lydon* v. *Edison Electric Illuminating Co.* 529.

In Freight Yard.

41. If the engineer in charge of a dummy engine of a railroad corporation, which is standing on a track in a freight yard of the corporation early in the morning with no cars or other engines near it, in cleaning out the engine throws hot ashes in the face of a manager of a wholesale beef dealer, who is in a place where the engineer cannot see him and is there as a mere licensee uninvited by the corporation, the corporation cannot be held liable for the personal injuries thus caused if they resulted from mere lack of ordinary care on the part of the engineer and not from an intentionally injurious or wanton and reckless act on his part. *O'Brien* v. *Union Freight Railroad*, 449.

In Construction of Building.

Action by employee against employer for personal injuries caused by personal negligence of defendant while plaintiff was helping to pass plank from lower to upper floor of building being constructed, see *ante*, 5.

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Of One owning or occupying Real Estate.

Action against owner of building, eaves on bay window of which overhung sidewalk so that drippings therefrom made ice on sidewalk upon which plaintiff slipped and fell, see *ante*, 37; NUISANCE, 1, 2.

In Factory.

Action by child, employed in factory contrary to provisions of St. 1909, c. 514, §§ 56, 61, for injuries of which employment contrary to law was proximate cause, see LABOR, 1–8.

Violation of Statute.

Violation of law of road, R. L. c. 54, § 1, as evidence of negligence, see PRACTICE, CIVIL, 11.

Violation of statute requiring operator of automobile upon highway to be licensed is merely evidence of negligence on part of operator and does not make him trespasser upon highway, see *ante*, 38.

Mere fact, that child under fourteen years of age asked for employment in factory, does not preclude him from recovery from employer for injuries resulting from violation of St. 1909, c. 514, §§ 56, 61, see LABOR, 4.

Violation of Law of Road.

Violation of law of road as evidence of negligence, see PRACTICE, CIVIL, 11.

Matter of Conjecture.

Statement of principles of law relating to burden of proof in actions for personal injuries caused by negligence when plaintiff relies on circumstantial evidence, and application of them in action against street railway company for personal injuries caused by explosion of box of dynamite into which street car ran on public way, where it was held that determination of responsibility for accident was left by evidence too much to conjecture, see EVIDENCE, 3; *ante*, 20.

Proximate Cause.

Violation of St. 1909, c. 514, §§ 56, 61, in employing child less than fourteen years of age in factory, which was held might have been found to have been proximate cause of injury to child, see LABOR, 3.

Gross.

Action for death of one struck by electric street car run at rate of speed grossly excessive, see *ante*, 25, 32, 33.

Causing Death.

Action for death of one struck by electric street car run at rate of speed grossly excessive, see *ante*, 25, 32, 33.

Act of driver of automobile truck which threw fellow employee from truck and killed him was held under circumstances to be act of fellow servant and not of superintendent, so that employer was not liable, see *ante*, 13.

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Action for instantaneous death of one killed by coming in contact, while in tree, with electric light wire from which insulation had worn, where it was held there was no evidence that plaintiff's decedent when killed was in exercise of due care, see *ante*, 40.

Liability of mill corporation or of railroad corporation, or of both, for personal injuries and death of employee of mill corporation due to defect in loaded car which his employer had received from railroad corporation, see *ante*, 12, 15, 31; JOINT TORTFEASORS, 1.

Constitutionality of proposed statute, now St. 1911, c. 751, which among other things provided that, in actions against employer to recover damages for personal injuries sustained by employee in course of employment or for death resulting from such personal injuries, neither contributory negligence of employee which did not amount to wilful misconduct, nor assumption of risk by him nor fact that injury resulted from negligence of fellow servant, should be defense, see WORKMEN'S COMPENSATION ACT, 1–6.

Survival of Action.

Action by father for loss of services of minor son and for expenses of medical attendance incurred by reason of personal injuries to son caused by defendant's negligence does not survive death of father, see SURVIVAL OF ACTIONS, 1–3.

NEW TRIAL.

See PRACTICE, CIVIL, 14, 17, 22; ATTORNEY AT LAW, 2.

NOTICE.

1. A general public notice required by law in this Commonwealth to be published in a newspaper must be printed in the English language and in a newspaper printed in that language. *Conners* v. *Lowell*, 111.

Application of foregoing, see TAX, 19.

Notice of tax sale by publication and posting, see TAX, 19, 20, 30–32.

Certain acts were held not to be compliance with Rules 44 and 27 of the Superior Court with regard to giving notice of filing of bill of exceptions, see PRACTICE, CIVIL, 13.

Person who enters into contract to purchase land not knowing that land is subject to unrecorded lease for term exceeding seven years and who before consummation of purchase learns of lease but completes purchase nevertheless, is not in position of purchaser of land for value without notice of lease, but takes land subject to it, and cannot compel lessee who brings suit in equity for establishment of his rights to reimburse him to any extent, see EQUITY JURISDICTION, 23, 24.

Certain notice to employer by attorney for injured employee was held not to satisfy requirements of R. L. c. 106, § 75, now St. 1909, c. 514, § 132, see NEGLIGENCE, 6.

NOVATION.

Statute of frauds does not exclude recovery where there is novation, see FRAUDS, STATUTE OF, 1.

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NUISANCE.

1. Since a landlord is responsible for injuries resulting to third persons from the maintenance upon his property in the possession of a tenant of a nuisance caused by a condition of the premises which was in existence at the time when they were let, the owner of a building, so constructed that a bay window overhangs a public sidewalk and drippings from it cause a ridge of ice upon the sidewalk, is liable to one who, while in the exercise of due care, was injured from a fall upon the ice, although the premises were in the possession of a tenant. *Marston* v. *Phipps*, 552.
2. Where, at the trial of an action against the owner of a building to recover for injuries alleged to have been caused by the plaintiff slipping upon a ridge of ice alleged to have been formed by water dripping from the roof of a bay window of the building which overhung the sidewalk, there is evidence from which the jury might find that the roof projected so that snow would and did accumulate upon its top and there melt and drip upon the sidewalk and freeze, and that the ridge of ice upon which the plaintiff fell was formed thus, the case is for the jury although different parts of the building may have been occupied by various tenants at will, especially if there is evidence that the defendant procured and paid for all the repairs that were made upon the building and assumed the care of keeping the sidewalk clear of snow and ice, employing one of the tenants to do it for him. *Ibid.*

Due care of plaintiff in such case, see NEGLIGENCE, 37.

Owner of land was held under circumstances to be unable to maintain suit in equity against railroad corporation to enjoin it from constructing conduit in such way as to diminish flow of certain creek, act complained of being merely public nuisance, see EQUITY JURISDICTION, 30.

Nor, if injury in question is done in abolition of grade crossing under decree of court, has he any standing in equity for damages or to enforce decree, see GRADE CROSSING, 1.

OFFICER.

1. It now is settled that a peace officer, who has a right to arrest a certain person without a warrant because he suspects on reasonable grounds that such person has committed a felony, also has a right to break open doors for the purpose of making the arrest. *Commonwealth* v. *Phelps*, 396.
2. Where a peace officer has a right to make an arrest without a warrant, he has the right to summon others to assist him in making the arrest, subject to the qualification that he shall use reasonable judgment and no unnecessary violence or force; and what is reasonable depends upon the facts in each particular case. *Ibid.*
3. The right of a peace officer to arrest without a warrant a person whom he suspects on reasonable grounds of having committed a felony is not in conflict with the provisions of the Fourteenth Article of the Massachusetts Declaration of Rights or with those of the Fourth Amendment to the Constitution of the United States, which are in restraint of general warrants to make searches. *Ibid.*

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And one killing officer so acting is guilty of murder, see HOMICIDE, 2.
Other questions arising at trial of indictment for such murder, including correct statement in charge to jury of rights and duties of officer, see HOMICIDE, 3–11; PRACTICE, CRIMINAL, 3–5.
After return of officer on execution has been amended, recording of amended return has same effect as if return originally had read as amended, see EXECUTION, 1.

OPTION.

Whether value of agreement in lease of land giving lessee right to renew lease can be recovered in proceedings for assessment of damages resulting from abolition of certain grade crossing of railroad with private way, see LANDLORD AND TENANT, 1; DAMAGES, 5; EMINENT DOMAIN, 8.

PARENT AND CHILD.

Action by father for loss of services of minor son and for expenses of medical attendance incurred by reason of personal injuries to son caused by defendant's negligence does not survive death of father, see SURVIVAL OF ACTIONS, 1–3.

PARKS AND PARKWAYS.

In petition for certiorari, assessment of betterments from layout and construction of Columbia Road in Boston was held not to be illegal although large portion of it, including portion adjacent to petitioner's land, was superimposed upon way formerly laid out and constructed as parkway, see TAX, 5.
Ruling to same effect in suit in equity, see TAX, 6.
Metropolitan Parks District, see COMMISSIONERS TO APPORTION EXPENSES OF METROPOLITAN PARKS DISTRICT, 1–3.

PARTIES AND PRIVIES.

Determination of who were parties and privies to certain suit in equity so as to be bound by decree therein, see EQUITY JURISDICTION, 6, 7.

PARTNERSHIP.

1. Joint ownership of property by several, use of it in a business, sharing of profits and division of net proceeds upon dissolution make the part owners partners in the business and liable for its losses as well as beneficiaries of its profits, in the absence of a specific agreement defining by express terms the status of the part owners. *Forbes* v. *Thorpe*, 570.
Suit in equity for accounting, brought by owner of machinery against partnership, who under contract of agency had agreed to sell machinery for plaintiff and had defrauded him, and also against corporation to which partnership assets had been transferred, where there was cross-bill by corporation against defrauding partners, see EQUITY JURISDICTION, 15, 16, 29; EQUITY PLEADING AND PRACTICE, 6, 7; FRAUDS, STATUTE OF, 2.

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PASSENGERS.

Proprietor of "sight-seeing automobile" was held to be bound to exercise toward passengers highest degree of care consistent with proper transaction of business, whether or not he technically was common carrier of passengers, see CARRIER, 3.

Liability of street railway company for personal injuries to passengers, see NEGLIGENCE, 20, 21.

PATENT.

Construction of contract relative to use and sale of patent, see CONTRACT, 7.

PAUPER.

There never has been instance of appeal in equity *in forma pauperis* in this Commonwealth, see EQUITY PLEADING AND PRACTICE, 16.

PAYMENT.

1. At the trial of an action against a corporation for services as a salesman, the defendant filed a declaration in set-off. It appeared that the plaintiff had purchased shares of the capital stock of the defendant and had given therefor his note payable to the defendant's acting treasurer, who was at the same time its president, a member of its board of directors, the owner of a majority of its capital stock and practically in sole control of the corporation. The treasurer indorsed the note and thereafter the amount of interest that was paid thereon was charged to the plaintiff in his account with the company. These payments of interest constituted the items in the declaration in set-off. There was evidence that thereafter the plaintiff made an agreement with the company whereby he was to receive an increase of salary, the increase to be applied toward payment of the note, and that after several years, in an accounting between the plaintiff and the treasurer, acting for the defendant, it was agreed that a small balance due from the plaintiff to the defendant in his general account should be cancelled, that the plaintiff should be credited with the amount due to him on account of the reserved increase of salary, which amount exceeded the amount of the note and the interest items, and that the note should be returned to him discharged. The note was returned to him. *Held*, that a finding, that a settlement was made between the plaintiff and the defendant by which the note and all of the items of the declaration in set-off were paid, was warranted. *Ridenour* v. *H. C. Dexter Chair Co.* 70.

Whether acceptance and collection of check bearing words "in full to date" effected accord and satisfaction, see ACCORD AND SATISFACTION, 2, 3.

Whether acceptance and collection of check, proffered upon condition that it is in full settlement of unliquidated claim, even though accompanied by protestations that it is not so received, bars attempt to collect balance, see ACCORD AND SATISFACTION, 1.

Where, at trial of action by corporation against administrator on promissory notes, it appears that notes were signed by intestate and were indorsed in

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blank by payee who had delivered them to plaintiff on its paying to him their amount, and there is circumstantial evidence that when intestate signed notes he did so under agreement with corporation to hold him harmless, there is question for jury as to whether, when plaintiff paid amount of notes to payee, it did not pay its own notes and extinguish them, see CONTRACT, 13.

PLEADING, CIVIL.

Answer.

Where case is tried upon agreed statement of facts giving court no power to draw inferences of fact, but certain facts are averred in petition or declaration and are not denied or referred to in answer, such averments on appeal may be taken to have been admitted by defendant, see PRACTICE, CIVIL, 16.

Variance.

In action for breach of contract in writing calling for delivery of shares of stock in "company to be known as East Butte Mining Company," allegation that plaintiff had demanded shares was held under circumstances to have been supported by evidence that he had demanded shares in corporation named "East Butte Copper Mining Company," which sometimes was called "East Butte Mining Company," so that there was no variance between declaration and proof, see PRACTICE, CIVIL, 1.

Misjoinder of Counts.

1. If a declaration in an action of tort against two defendants contains three counts, each of which alleges that the plaintiff was injured by falling upon ice negligently allowed to accumulate in front of certain premises, the first count being against both defendants and the second count against one defendant and the third against the other, and if one of the defendants has died after the injury to the plaintiff and before the bringing of the action but the officer who served the writ makes a return of service at that defendant's "last and usual place of abode" and the other defendant files an answer and a suggestion of the death of his co-defendant but does not demur to the declaration, the case properly may proceed to trial against the only defendant served upon and answering and upon the count which sets out a cause of action against him alone. *Marston* v. *Phipps*, 552.

PLEADING, CRIMINAL.

Indictment.

Indictment for murder of deputy sheriff while he was attempting to arrest defendant on suspicion of having committed felony need not state that person killed was deputy sheriff, see HOMICIDE, 1.

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PRACTICE, CIVIL.

Officer's Return.

After return of officer on execution has been amended, recording of amended return has same effect as if return originally had read as amended, see EXECUTION, 1.

Parties.

Action of tort against two defendants where one defendant died before writ was served and declaration contained counts against defendants severally, but such defects were waived by remaining defendant not calling attention to them, see PLEADING, CIVIL, 1.

Variance.

1. At the trial of an action for breach of a contract in writing, it appeared that the contract provided that the defendant should deliver to the plaintiff a certain number of shares "of the capital stock of a company formed or to be formed to take over" certain property, "above company to be known as the East Butte Mining Company. In case of failure of these properties being sold as at present agreed this agreement to be null and void." There was evidence that when the contract was signed a corporation had been formed by the defendant under the laws of Arizona named the East Butte Copper Mining Company, that negotiations were being had with a Boston firm of stockbrokers to handle the enterprise for the defendant, and that they proposed to organize a new corporation under the laws of the State of Maine to be named the East Butte Mining Company; that the Boston firm finally refused further consideration of the matter; that the Arizona corporation was known as the "East Butte Mining Company" and as "East Butte" and that the defendant had admitted in substance that the Arizona corporation was the corporation referred to in the contract. The plaintiff had demanded from the defendant shares in the Arizona corporation, and the defendant's refusal to comply with that demand was the breach of the contract assigned in the declaration. The defendant asked for a ruling, that the fact, that the evidence showed that the plaintiff had demanded shares of the East Butte Copper Mining Company instead of shares of the "East Butte Mining Company" which the contract called for, constituted a variance fatal to the maintenance of the action. The presiding judge refused to make this ruling. *Held*, that the refusal was warranted by the evidence. *Hodgens* v. *Sullivan*, 533.

Amendment.

After return of officer on execution has been amended, recording of amended return has same effect as if return originally had read as amended, see EXECUTION, 1.

Abatement.

Dissolution of corporation in accordance with provisions of St. 1903, c. 457, §§ 52, 53, does not abate actions at law pending against corporation, see CORPORATION, 6.

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Agreement as to Facts.

2. At the trial of an action by the assignee of a corporation, engaged in the sale and lease of milking machines and the sale of dairy supplies, against one who had been its "division manager" for a certain territory, to recover upon an account annexed for certain supplies alleged to have been furnished to the defendant by the corporation, the plaintiff introduced in evidence an agreement, signed by the attorneys for the parties to the action, providing that the items and credits stated in the account annexed were substantially correct so far as they went; "that the defendant had some agency relations with the corporation previous to April 9 of a certain year; that thereafter up to some time in the following July they had business dealings and relations, agency or otherwise, when their dealings and relations ceased"; that "during the period of his said agency relations with the" corporation "the defendant received certain milking machinery supplies from the company, and was charged therefor by the company, in his accounts with them; that some of the supplies were in his possession at the time of the termination of his relations with the company. The defendant claims and the plaintiff denies that the defendant should be credited for such supplies as were in his possession at the time of the termination of such relations, the defendant contending and the plaintiff denying that the relations and agreements of the defendant with such company were such that said credit should be given. It therefore is agreed that the only question to be tried before the jury shall be whether or not the defendant shall have any credit for such goods as were in his possession at the termination of his relations with said company; and that if the jury answer that the relations between the defendant and said company were such that said defendant should not have such credit, then the jury may find for the plaintiff in" a certain sum; "but that if the relations between the defendant and the" corporation "were such as to entitle him to credit for such supplies which he had on hand at the termination of his relations with said company, then the court may refer the case to an assessor who shall determine the amount of credit to which the defendant is entitled because of such supplies." *Held*, that the foregoing did not amount to an agreement to shift the burden of proof from the plaintiff as to his general right to recover and to impose it upon the defendant to establish as an independent defense his right to return the supplies on hand and to receive credit for them. *Cox* v. *Savage*, 501.

Where case is tried upon agreed statement of facts giving court no power to draw inferences of fact, but certain facts are averred in petition or declaration and are not denied or referred to in answer, such averments on appeal may be taken to have been admitted by defendant, see *post*, 16.

Auditor's Report.

3. Where an auditor to whom a case has been referred makes a finding in favor of one of the parties without reporting the evidence, and at the trial there is no evidence other than the auditor's report, the presiding judge must order a verdict in accordance with the auditor's report, which is

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made *prima facie* evidence by statute and stands uncontrolled. The same result is reached, where, in addition to the auditor's report, oral evidence is introduced at the trial, but such evidence does not tend to contradict the findings of the auditor. *Wakefield* v. *American Surety Co.* 173.

4. In an action by a town against the surety on the bond of a contractor, an auditor to whom the case was referred found that the contractor abandoned the work to be done under his contract with the plaintiff and executed an instrument purporting to assign his contract to a certain corporation, that the contract with the plaintiff provided that it should not be assigned except with the previous consent of the plaintiff's board of sewer commissioners to be signified by indorsement on the contract and that no previous assent to the instrument of assignment was given by indorsement upon the contract or in any manner. The auditor made a general finding for the plaintiff. At the trial of the case, in addition to the auditor's report, there was oral evidence. Several witnesses testified that, after the assignment, the original contractor had nothing to do with the work and that it was prosecuted wholly by the corporation, which purported to be the assignee, with the knowledge and without objection from the plaintiff's board of sewer commissioners, until at the end of six months the work was stopped by a notice from the plaintiff that it was not being prosecuted as required and that it would be completed by the plaintiff as provided in the contract. It was shown that there was considerable correspondence between the attorney for the plaintiff and the defendant, as surety on the original contractor's bond, in which the attorney repeatedly asserted that the plaintiff would not assent to the assignment, except upon certain conditions which never were complied with, and that the checks of the plaintiff in payment for the work done by the assignee all were made to the order of the original contractor and not to the assignee. There was no evidence of any express assent. The presiding judge ordered a verdict for the plaintiff. *Held*, that the knowledge by the plaintiff's officers of the assignment and of the work done by the assignee, under the circumstances shown and in view of the correspondence refusing such assent, was not evidence of the plaintiff's assent to the assignment of the contract, or of a waiver of the clause in the contract requiring such assent, or of a novation accepting the substitution of the assignee for the original contractor; that, therefore, there being no evidence to control or contradict the finding of the auditor, it was the duty of the judge to order a verdict for the plaintiff. *Ibid.*

Hearing by Judge without Jury.

Reopening of hearing for evidence after arguments.

5. An action upon a decree of a Michigan court, in which were involved questions as to the law of Michigan, was tried before a judge without a jury, and an expert from Michigan testified and was cross-examined. About a month after the case had been argued fully by counsel and after the expert had returned to Michigan, the judge sent for both parties and told them what his opinion then was on the matters in issue, stating among other things that he was not satisfied that proper service had been

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made upon the defendant, and that, if he could be satisfied on that matter, he should find for the plaintiff. On application by the plaintiff and subject to an exception by the defendant, the case thereupon was reopened, a deposition upon written interrogatories of another expert in Michigan was taken, and the case was reheard and judgment rendered for the plaintiff. *Held*, that the action of the judge in reopening the case was within his power and was not the subject of exception. *Wells* v. *Wells*, 282.

Requests and rulings.

6. An exception to the refusal by a judge, before whom a case was tried without a jury, to make rulings which were inapplicable to the evidence or which were contrary to his findings of fact upon conflicting or unreported evidence, cannot be sustained. *Bangs* v. *Farr*, 339.

7. At the trial of an action at law before a judge, sitting without a jury, a party has a right by the seasonable presentation of appropriate requests for rulings to learn the principles of law which the judge is to apply in reaching his conclusions, and, where such requests are sound in law, pertinent to the issues and applicable to the evidence, it is the duty of the judge to grant them and to follow the rulings thus made in arriving at his decision; but to obtain such a ruling the party who wants it made must request it himself, and he cannot complain or except because, after the opposing party had presented to the judge requests for rulings, he withdrew them with the assent of the judge and they were not passed upon. *Ibid.*

Exception to refusal of judge, who heard case without jury, to grant certain ruling was overruled because, among other reasons, ruling requested contained finding of fact which judge had right to determine against party requesting it, see CONTRACT, 6.

Findings.

8. Although the findings of fact made by a trial judge have the same effect as the verdict of a jury and only can be set aside when they are without any foundation in the evidence, yet where, so far as appears upon the printed record before this court, a finding of a judge rests merely upon conjecture, an exception to a refusal to rule that it was not warranted by the evidence will be sustained. *Bangs* v. *Farr*, 339.

Exception to certain findings by judge who heard case without jury was overruled because evidence contrary to them was not "quite so conclusive" as to make it necessary that findings be revised, see CONTRACT, 5.

Findings by judge who heard petition for disbarment were held not to be open to revision on exceptions and appeal by respondent, see ATTORNEY AT LAW, 4.

Conduct of Trial before Jury.

Requests, rulings and instructions.

9. A judge presiding at a jury trial cannot be required to give a ruling which singles out only some of the facts bearing upon the issues being tried and states the law with regard thereto. *O'Leary* v. *Boston Elevated Railway*, 62.

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Practice, Civil (*continued*).

10. In an action for the breach of a contract in writing, it appeared that the provisions of the contract were as follows: "For and in consideration of the surrender of a certain agreement . . . signed by W in regard to the payment of a commission, . . . I [the defendant] hereby agree to deliver to [the plaintiff] two thousand shares of the capital stock of a company formed or to be formed to take over said property. Said stock to be delivered as soon as issued; . . . above company to be known as East Butte Mining Company. In case of failure of these properties being sold as at present agreed this agreement to be null and void." The defendant asked for and the presiding judge refused a ruling to the effect that, if the contract had become "null and void" because the properties had not been conveyed "as at present agreed," then the plaintiff was in the same position with reference to his rights under the agreement with W as he was before he surrendered them. *Held*, that the refusal was proper, the ruling asked for not being germane to the issue being tried. *Hodgens* v. *Sullivan*, 533.

11. In an action for injuries caused by a collision of two automobiles when being driven upon a highway in opposite directions, the defendant asked for the following instruction: "If the jury find that at the time of the accident the defendant was driving on the right of the middle of the travelled part of the way, it is evidence of the exercise of due care on his part, and if the jury shall find that the plaintiff was driving his machine in an opposite direction and collided with the defendant, this is evidence that the plaintiff was acting in violation of R. L. c. 54, § 1, requiring him to drive to the right of the middle of the travelled part of the road, and unexplained indicates negligence on the part of the plaintiff." There was evidence to which this instruction was applicable, and there also was other evidence bearing upon the questions whether the plaintiff was in the exercise of due care and whether the defendant was negligent. The presiding judge refused to give the instruction. *Held*, that, although the instruction requested was a correct statement of the law and properly might have been given by the judge, yet, there having been other evidence in the case with which the request did not deal, the judge in his discretion was not bound to give the instruction in the form requested, because it selected evidential facts that might or might not be found by the jury and separated them from other parts of the evidence as the subject of a special instruction as to their effect. *Bourne* v. *Whitman*, 155.

Request for ruling, that on all evidence at trial verdict for plaintiff was unwarranted, comes too late at hearing of motion for new trial, see *post*, 17.

Judge's charge.

General exception to whole of charge of judge to jury in action by passenger against street railway company for injuries alleged to have been caused by starting of car as plaintiff was alighting, which were held to be without merit because charge stated law tersely and correctly, see NEGLIGENCE, 21.

Redirect examination of witness.

12. At the trial of an action against a street railway company by a girl six years of age, when injured, to recover for personal injuries caused by the

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plaintiff being run into by a car of the defendant as she was crossing a street, the plaintiff testified in direct examination that she saw the car approaching, that it slowed down and then suddenly increased its speed and caught her before she could escape. In cross-examination she testified that when she first saw the car she was eight feet away. In redirect examination she was asked, "If you saw the car coming just before you stepped along to go over the tracks on which the car was, why didn't you keep out of the way of the car?" and answered, "I moved out of the way and then it came swifter and knocked me down." On motion of the defendant and subject to an exception by the plaintiff the answer was stricken out as not responsive to the question. The presiding judge then gave the plaintiff leave to testify anew as to all the circumstances of the accident, and, she appearing tired, allowed her to rest while other witnesses were testifying. Before the afternoon adjournment of the court the defendant's counsel stated that, if the plaintiff was to testify further, he desired it to be done before adjournment "and not in the morning after there has been a chance to talk with her." Thereupon the plaintiff's counsel stated: "I won't put her on after that remark." In answer to a special question, the jury found that the plaintiff was in the exercise of due care. *Held*, that the plaintiff's exception should not be sustained, because the answer stricken out was made immaterial on the question of the plaintiff's due care by the finding of the jury, and was a repetition on the question of negligence of the motorman; and because the plaintiff was given an opportunity to go over the matter again and did not do so. *O'Leary* v. *Boston Elevated Railway*, 62.

Question for jury.

Certain contract was held to be ambiguous, and action of judge in leaving to jury, as question of fact, question as to what was referred to by certain words in contract, was held to have been proper, see CONTRACT, 3; *ante*, 1.

Ordering Verdict.

Certain agreement as to facts, made by counsel for parties in action of contract, was held not to affect burden of proof, and ordering of verdict for plaintiff was held to be improper, see *ante*, 2; AGENCY, 2.

Case where at trial only evidence was report of auditor and some oral evidence which was held not to affect conclusions reached by auditor, and where, therefore, it was held that verdict rightly was ordered for plaintiff in accordance with those conclusions, see *ante*, 3, 4.

Where, at trial of action by corporation against administrator on promissory notes, it appears that notes were signed by intestate and were indorsed in blank by payee who had delivered them to plaintiff on its paying to him their amount, and there is circumstantial evidence that when intestate signed notes he did so under agreement with corporation to hold him harmless, there is question for jury as to whether, when plaintiff paid amount of notes to payee, it did not pay its own

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notes and extinguish them and verdict therefore should not be ordered, see CONTRACT, 13.

Exceptions.

13. The giving of an oral notice of the filing of a bill of exceptions to the counsel of the adverse party on the day of the filing and furnishing him on the same day with an unsigned copy of the bill of exceptions are not a compliance with Rule 44 of the Superior Court, which requires that notice of the filing of a bill of exceptions shall be given to the adverse party within the required time, and Rule 27, which prescribes that a notice required by the rules of the Superior Court shall be in writing. *Shawmut Commercial Paper Co.* v. *Brigham*, 199.

14. The denial, by the judge who presided at a trial, of a motion for a new trial where the party who made the motion contended that the jury must have disregarded the judge's instructions, is discretionary and is not subject to exception. *Ridenour* v. *H. C. Dexter Chair Co.* 70.

15. If, at the trial of an action of contract where the plaintiff, in defense to a declaration in set-off, his answer to which has been merely general denial and payment, introduces in evidence an auditor's report which states that the items in the declaration in set-off had been included in a settlement between the parties and were discharged thereby, and the defendant does not object to the report on the ground that the plaintiff had not pleaded an accord and satisfaction and does not call that defect in the pleadings to the attention of the presiding judge, the defendant cannot rely upon such defect in this court for the first time on exceptions to the refusal of the trial judge to give certain rulings which did not in terms mention it. *Ibid.*

Contentions not relied on in Land Court, or in Superior Court at trial of jury issues on appeal from Land Court, and inconsistent with contentions there made, cannot be urged on exceptions to this court, see WAY, 8.

When exception to findings of judge who without jury heard action at law will be sustained, see *ante*, 8.

Denial of motion for new trial depending on weight of evidence in disbarment proceedings is discretionary and is not open to revision on exceptions, see ATTORNEY AT LAW, 2.

Exceptions to refusal of judge, who without jury heard action at law, to make rulings which were inapplicable to evidence and contrary to his findings of fact, cannot be sustained, see *ante*, 6.

Party to action can have no exception to refusal of judge to rule in accordance with request made by opposing party, especially where request is withdrawn before judge passes upon it, see *ante*, 7.

Exception to refusal of judge, who heard case without jury, to grant certain ruling, which was overruled because, among other reasons, ruling requested contained finding of fact which judge had right to determine against party requesting it, see CONTRACT, 6.

Exception to certain findings by judge who heard case without jury, which were overruled because evidence contrary to them was not "quite so conclusive" as to make it necessary that findings be revised, see CONTRACT, 5.

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Appeal.

16. On an appeal from a judgment made upon an agreed statement of facts, which gave the court no power to draw inferences of fact from the facts agreed upon, if a material fact necessary to recovery is not contained in the agreed statement of facts but is averred in the declaration or petition and is not denied or referred to in the answer, under R. L. c. 173, § 24, it may be taken to have been admitted. *Putnam* v. *Middleborough*, 456.

Findings by judge who heard petition for disbarment were held not to be open to revision on exceptions and appeal by respondent, see ATTORNEY AT LAW, 4.

New Trial.

17. A request for a ruling, that upon all the evidence at a trial a verdict for the plaintiff is unwarranted, comes too late, when made at the hearing of a motion for a new trial after a verdict has been returned for the plaintiff, because such a question should have been raised before the verdict. *Ridenour* v. *H. C. Dexter Chair Co.* 70.

Denial of motion for new trial in disbarment proceedings, which is based on ground that findings were against evidence and weight of evidence, is discretionary and is not open to revision on exceptions, see ATTORNEY AT LAW, 2.

Denial of motion for new trial, where moving party contended jury must have disregarded judge's instructions, is discretionary and is not subject to exception, see *ante*, 14.

Where petitions by lessor and by lessee of certain premises, injured by work done in abolition of grade crossing of railroad with private way, were tried together and verdicts in lessee's petition have been set aside on sustaining of exceptions of defendant, and motions for new trial in lessor's petitions are pending, those motions should be determined before new trial on lessee's petition, see *post*, 22.

Witness Certificate.

What is attendance as to which witness should certify, see WITNESS, 1, 2.

Rules of Court.

Certain acts were held not to be compliance with requirements of Rules 44 and 27 of the Superior Court with regard to giving notice of filing of bill of exceptions, see *ante*, 13.

In Disbarment Proceedings.

In disbarment proceedings technical nicety of common law criminal pleading is not required. Applications of principle, see ATTORNEY AT LAW, 1–4.

Trial of Issues on Appeal from Land Court.

18. At the trial in the Superior Court of an issue framed on an appeal from the Land Court by the owner of certain land who sought to have his title registered, the issue being, whether the respondent had acquired a right of

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way over the locus by adverse user, the petitioner has a right to open and close before the jury, irrespective of who has the burden of proof as to the issue. *Bigelow Carpet Co.* v. *Wiggin*, 542.

Contentions not relied on in Land Court, or in Superior Court at trial of jury issues there on appeal from Land Court, and inconsistent with contentions there made, cannot be urged on exceptions to this court, see WAY, 8.

Proceedings for Damages caused by Abolition of Grade Crossing.

19. Statement, by LORING, J., of the proper procedure where leased land, on which buildings containing fixed machinery have been erected by the lessee, has been taken or damaged by the exercise of the power of eminent domain and petitions have been brought by the lessor and the lessee to have their damages assessed. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 298.

20. Where the owner of a large tract of land leases a portion of it to one who, upon the portion so leased being damaged by an act of eminent domain by a railroad company in the abolition of a grade crossing, files a petition for the assessment of his damages, and under the provisions of R. L. c. 48, § 21; c. 111, § 153, the lessor is ordered to intervene, the lessor should not include in his intervening petition damage to any other land than that described in the petition of the lessee. *Ibid.*

21. If the owner of a tract of land, a part of which is subject to a lease, upon the land being damaged by acts of eminent domain by a railroad corporation in the abolition of a grade crossing, files a petition for the assessment of his damages as to his entire tract including that subject to the lease, and the lessee also files a petition for the assessment of his damages, and the court under the provisions of R. L. c. 48, § 21; c. 111, § 153, orders the lessor in the proceedings instituted by the lessee to file an intervening petition for the assessment of the damages he had suffered with regard to the land subject to the lease, the making of such an order brings to an end the lessor's right to proceed under the petition he already had filed so far as his interest in the land subject to the lease is concerned. *Ibid.*

22. Where the owner of certain land and one to whom he has leased a portion of it, upon the land's being damaged by acts of eminent domain of a railroad corporation in the abolition of a grade crossing of the railroad with a private way, severally file petitions against the railroad corporation for the assessment of their damages and, the petitions being tried together and verdicts rendered for the petitioners, a motion of the respondent to set aside the verdict rendered for the lessor is filed but not acted upon, and exceptions by the respondent in the action of the lessee against it are sustained and a new trial ordered, there should be no new trial of the petition of the lessee until it is determined whether there is to be a new trial of the petition of the lessor, because the jury should be in a position to ascertain first and set forth in their verdict the entire damage to the property as if it were owned by one person in fee, and then to apportion such entire damage between the lessor and the lessee. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 298.

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Proceedings at former trial of same case reviewed and verdicts explained with regard to what elements they included, see DAMAGES, 6.

PRACTICE, CRIMINAL.

Variance.

1. At the trial of a criminal complaint charging that the defendant in that part of Boston called South Boston had in his possession with intent to sell milk "to which a certain foreign substance, . . . a further description whereof is unknown to the complainant," had been added, the chemist of the bureau of milk inspection of Boston, who was not the complainant, properly may testify that the foreign substance was "cow dung," such testimony not constituting a variance, because it is a presumption of fact that the statement in the complaint that "a further description" of the foreign substance was unknown "to the complainant" is true, and the fact that the witness knew its real nature does not as matter of law conclusively rebut that statement. *Commonwealth* v. *Graustein & Co.* 88.
2. Even although, at the trial of a criminal complaint charging the defendant therein with having in his possession with intent to sell milk to which "a certain foreign substance, . . . a further description whereof" was unknown to the complainant, had been added, it should appear that the complainant when he swore to the complaint knew that the foreign substance was cow dung, an exception by the defendant to the admission of evidence of the specific character of the foreign substance would not be sustained, because, the essential elements of the crime being stated correctly in the complaint, the variance would not be prejudicial to the defendant. *Ibid.*

Selection of Jurors.

3. At a criminal trial, as at a civil one, the determination whether questions shall be put by the presiding judge to a juror in addition to those prescribed by R. L. c. 176, § 28, is wholly within the discretion of the judge. *Commonwealth* v. *Phelps*, 396.

Care of Jurors during Trial.

4. In this Commonwealth the defendant in a capital case has not a right to have the jurors who already have been sworn and impanelled kept together during a recess taken by the court before the impanelling of the jury is completed. *Commonwealth* v. *Phelps*, 396.

Conduct of Trial.

No exception lies to statements by judge at trial during colloquies with counsel, see *post*, 5.

Exceptions.

5. At the trial of a criminal case, as of a civil one, no exception lies to an alleged statement by the presiding judge in the course of a colloquy with counsel during the trial, which is merely an explanation by him to the ob-

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jecting counsel of his reason for admitting a question. *Commonwealth* v. *Phelps*, 396.

At Trial of Indictment for Murder.

Rulings on matters of practice at trial for murder, see HOMICIDE, 1, 4–11.

PRESCRIPTION.

Petition in Land Court for registration of title to land where respondents contended that they had right of way over land acquired by prescription, see WAY, 2–8.

PRIVIES AND PARTIES.

See EQUITY JURISDICTION, 6, 7.

PROBATE COURT.

Where one died testate and, controversy arising as to will, agreement of compromise is made and decree of Probate Court is entered in accordance therewith, tax on successions and inheritances should be assessed on property as disposed of by will and not as disposed of under decree of compromise, see TAX, 12.

Certain testator by his will devised and bequeathed entire residue of his estate to executor "to have and to hold . . . without the intervention of any trustee" during his life, and provided that on executor's decease "whatever may be remaining" of residue should be given to certain town. After death of executor account was filed on his behalf stating that he had paid residue over to himself, which was held proper under terms of will without intervention of trustee or order of distribution, see EXECUTOR AND ADMINISTRATOR, 1.

Decree of Probate Court having jurisdiction of settlement of estate of certain decedent, determining parties who shall share therein, does not bar suit in equity against administrator and certain beneficiaries to enforce equitable charge upon shares of beneficiaries who are defendants, see EQUITY JURISDICTION, 8.

Decree of Probate Court allowing accounts of administrator of estate and ordering distribution, where there was no reference in proceedings to inheritance tax and no provision was made for its payment and Commonwealth was not made party to proceedings, is no defense to information by Attorney General seeking to collect that tax, see TAX, 11.

Allowance of final accounts of administrator with will annexed and of trustee under will was held not to preclude Commonwealth thereafter from claiming succession and inheritance tax under St. 1891, c. 425, as amended by St. 1902, c. 473, see TAX, 10.

PROCEEDINGS TO COMPEL ACTION TO TRY ADVERSE CLAIM TO LAND.

1. Upon a petition under R. L. c. 182, §§ 1–5, by a person in possession of land claiming an estate of freehold therein, to compel actual or possible

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adverse claimants to bring actions to try their claims, the question of the title to the land cannot be adjudicated, and a disclaimer by a respondent under § 3 does not operate to convey any new title to the petitioner, or to preclude one holding under a deed from the disclaiming respondent, which was unrecorded at the time of the disclaimer, from afterwards asserting his title. *Weld* v. *Clarke*, 9.

PROXIMATE CAUSE.

Violation of St. 1909, c. 514, §§ 50, 61, in employing child less than fourteen years of age in factory, which, it was held, might have been found to be proximate cause of injury to child, see LABOR, 3.

RAILROAD.

Case determining that liability of carrier for loss of baggage of passenger is not limited by stipulation printed in schedule of rates, fares and charges filed with interstate commerce commission, in absence of knowledge thereof by passenger, see CARRIER, 4, 6.

Actions for personal injuries against railroad corporation, see NEGLIGENCE, 3, 7–11, 31, 41.

RECEIVER.

Trustee, to whom corporation had mortgaged certain real estate to secure bonds, upon corporation property being placed in hands of receiver who refused to pay tax upon real estate, paid tax and was held to be subrogated both to right of corporation as to lien upon land and also to right of tax collector as respected funds in hands of receiver, see EQUITY JURISDICTION, 13.

RECORDING.

Requirement of registering of copy of execution under authority of which land has been taken applies only where land thus taken had not previously been attached on mesne process, see EXECUTION, 3.

REFERENCE AND REFEREE.

Estimate by engineer made in good faith under provisions of building contract was held binding on parties under circumstances, see SURETY, 2.

REGISTRATION.

Requirement of registering of copy of execution under authority of which land has been taken applies only where land thus taken had not previously been attached on mesne process, see EXECUTION, 3.

RES JUDICATA.

Allowance of final accounts of administrator with will annexed and of trustee under will was held not to preclude Commonwealth thereafter from

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claiming succession and inheritance tax under St. 1891, c. 425, as amended by St. 1902, c. 473, see TAX, 10.

Denial, for want of jurisdiction, of motion to have judgment in action at law vacated because false and fraudulent witness certificates were filed, was held not to be adjudication of question as to whether certificates were false and fraudulent, see ATTORNEY AT LAW, 3.

Final decree of Probate Court having jurisdiction of settlement of estate of certain decedent, determining parties who shall share therein, does not bar suit in equity against administrator and certain beneficiaries to enforce equitable charge upon shares of beneficiaries who are defendants, see EQUITY JURISDICTION, 8.

Decree of Probate Court allowing accounts of administrator of estate and ordering distribution, where there was no reference in proceedings to inheritance tax and no provision was made for its payment and Commonwealth was not made party to proceedings, is no defense to information by Attorney General seeking to collect that tax, see TAX, 11.

RULES OF COURT.

Certain acts were held not to be compliance with Rules 44 and 27 of the Superior Court with regard to giving notice of filing of bill of exceptions, see PRACTICE, CIVIL, 13.

SALE.

Conveyance in trust, where, although grantor reserved no power of revocation, property was held not to have passed to beneficiary with all attributes of ownership independently of death of grantor, so that, beneficiary not being "*bona fide* purchaser for full consideration in money or money's worth," succession tax should be paid, see TAX, 15, 16.

Person who enters into contract to purchase land not knowing that land is subject to unrecorded lease for term exceeding seven years and who before consummation of purchase learns of lease but completes purchase nevertheless, is not in position of purchaser of land for value without notice of lease, but takes land subject to it, and cannot compel lessee who sues to establish his rights to reimburse him to any extent, see EQUITY JURISDICTION, 23, 24.

SCIENTIFIC INSTITUTION.

Exemption from taxation of equitable interest of such institution in fund held in trust for it, see TAX, 17.

SHIP.

Action by owner of steamship for breach of charter party for hire of ship, where ship was unseaworthy for time, see CONTRACT, 9.

SIGHT-SEEING AUTOMOBILE.

Proprietor of "sight-seeing automobile" was held to be bound to exercise toward passengers highest degree of care consistent with proper transac-

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tion of business, whether or not he technically was common carrier of passengers, see CARRIER, 3.

SNOW AND ICE.

See NUISANCE, 1, 2.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See EQUITY JURISDICTION, 2–5.

STATUTES CITED AND EXPOUNDED.

See page 773.

STOCKBROKERS.

Certain acts of firm of stockbrokers in dealing with securities purchased by them for another firm of stockbrokers in different city, who had placed with first firm order for purchase on behalf of customer, which were held to amount to conversion of securities, see CONVERSION, 1.

STREET RAILWAY.

1. In a suit in equity brought by the selectmen of a town against a street railway corporation under St. 1906, c. 463, Part III. § 157, formerly R. L. c. 112, § 100, to enforce a condition contained in a location granted by the plaintiffs to the defendant, the enforcement of the terms of the location is not a matter of discretion in which a hardship that the defendant may suffer will be considered, and it is the duty of the court to enforce all valid conditions so imposed. *Selectmen of Westwood* v. *Dedham & Franklin Street Railway*, 213.
2. In a suit in equity brought by the selectmen of a town against a street railway corporation under St. 1906, c. 463, Part III. § 157, formerly R. L. c. 112, § 100, to enforce a condition imposed in a grant of location from the plaintiffs to the predecessor of the defendant, to whose franchises and privileges it had succeeded, that the rate of fare should not exceed the sum of five cents for any distance in one continuous trip within the limits of the town or from any point along the line of the road within the town to its terminus at that time in either of two other towns, it appeared that the location granted by the plaintiffs to the predecessor of the defendant became operative less than one month before St. 1898, c. 578, which deprived local boards of the power to regulate fares, went into effect. *Held*, that the condition imposed on the defendant's predecessor was binding on the defendant, that it was valid, and that its validity was not affected by the last named statute. *Ibid.*

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3. In a suit in equity brought by the selectmen of a town against a street railway corporation under St. 1906, c. 463, Part III. § 157, formerly R. L. c. 112, § 100, to enforce a lawful condition in a grant of location from the plaintiffs to the predecessor of the defendant, which is binding on the defendant, requiring that the rate of fare shall not exceed the sum of five cents within the town and to certain termini, it is no defense for the defendant to show that the road although conducted with economy has been operated by the defendant at a considerable loss, that the fares which the defendant has established in excess of the limitation in the grant of location are reasonable, and that, if they are reduced to the rate fixed by the grant, the service must be curtailed and the people of this and other towns will be deprived of transportation facilities now enjoyed. *Selectmen of Westwood* v. *Dedham & Franklin Street Railway*, 213.

Delay in bringing of such suit which did not amount to laches, see EQUITY JURISDICTION, 1.

Actions for personal injuries against street railway companies, see NEGLIGENCE, 20–30, 32, 33; EVIDENCE, 8.

SUBROGATION.

One who under agreement with beneficiaries of estate of certain decedent had undertaken liability for services of counsel in enforcing of beneficiaries' rights and was compelled to satisfy decree in equity which such counsel procured against him for payment of his fees, is subrogated to rights of counsel against beneficiaries, see EQUITY JURISDICTION, 4, 26.

Trustee, to whom corporation had mortgaged certain real estate to secure bonds, upon corporation property being placed in hands of receiver who refused to pay tax upon real estate, paid tax and was held to be subrogated both to right of corporation as to lien upon land and also to right of tax collector as respected funds in hands of receiver, see EQUITY JURISDICTION, 13.

SUCCESSION TAX.

See TAX, 7–16.

SURETY.

1. There is no obligation on the part of a town toward the surety upon a bond which was given by a contractor to ensure the faithful performance of his contract with the town, to keep the surety advised as to the condition of the work under the contract. The surety must protect his own interest by seeing that his principal performs the duty of which the surety has guaranteed the performance. *Wakefield* v. *American Surety Co.* 173.

2. At the trial of an action by a town against the surety on a bond, which was given to the town by a contractor, the defendant contended that a payment made by the plaintiff to the contractor before his default was in advance of what was due to him under the contract, and that thereby the security of the surety was diminished. It appeared that the payment in question was made upon an approximate estimate by the plaintiff's chief

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engineer of the value of the work done at the time and that the engineer in making the approximate estimate, which he was required to make by the terms of the contract, certified in good faith to more work having been done than actually had been completed at the time, but that afterwards this was adjusted by deductions from subsequent estimates, so that the plaintiff in the end received full value for all payments made by it. An auditor found that there was no such payment in advance as was alleged by the defendant. *Held*, that the estimate of the engineer made under the contract in good faith was binding upon all the parties, and that the payment could not be considered as made in advance. *Wakefield* v. *American Surety Co.* 178.

Questions as to construction, validity, breach, and damages resulting from breach, of bond of certain city treasurer and collector of taxes, and as to liability of surety thereon, which arose in action upon bond by city, see BOND, 2–8.

SURVIVAL OF ACTIONS.

1. Under R. L. c. 171, § 1, as at common law, an action by a father for the loss of the services of his minor son and expenses for medical attendance, incurred by reason of personal injuries to the plaintiff's son caused by the defendant's negligence, does not survive. *Keating* v. *Boston Elevated Railway*, 278.
2. An action of tort for "damage to the person," which survives under R. L. c. 171, § 1, is an action for damage to the person of the decedent himself, and does not include an action for expenses incurred by the decedent by reason of damage to the person of his minor son. *Ibid.*
3. An action of tort for "damage to . . . personal property," which survives under R. L. c. 171, § 1, is an action for damage to specific property, and does not include an action for the reduction of the decedent's property in consequence of paying doctor's bills incurred by him to cure his minor son when injured by the defendant's tortious act. *Ibid.*

TAX.

Assessment.

1. The holder of a tax deed of land which is invalid on its face is not the person "appearing of record" as owner, to whom an assessment of a tax on the land should be assessed. *Conners* v. *Lowell*, 111.
2. If a tax on certain land is assessed to the holder of a tax deed thereof which is invalid on its face, such assessment is invalid, and the sale of the land for the collection of a tax so assessed is void. *Ibid.*
3. Review by HAMMOND, J., of legislation of Colony, Province and Commonwealth with regard to whether a tax upon property held in trust should be assessed to the trustee or to the beneficiary. *Watson* v. *Boston*, 18.
4. Where an executor of the will of a resident of this Commonwealth, who was appointed by a Probate Court of this Commonwealth, is a resident of another State in which there is personal property of the estate of the tes-

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tator and has been appointed in that State ancillary executor of the will to administer such property, the property in such other State is not in his possession or control as executor of the will in this Commonwealth and cannot be taxed to him here as such executor. *Putnam* v. *Middleborough*, 456.

Betterments.

5. Upon a petition for a writ of certiorari to quash the proceedings in assessing upon adjoining land of the petitioner betterments for the laying out and construction of Columbia Road in Boston, it appeared that the portion of Columbia Road on which the land of the petitioner abutted, about sixteen hundred feet in length, in 1892 was taken for a public park by the park commissioners of Boston and was laid out and constructed as a parkway called Dorchesterway under an act which authorized the assessment of betterments, that at that time a settlement was made between the city and the owners, by which a gross sum was paid to the owners and the city agreed to construct a roadway and walk, to which the owners could have access, and the owners made a conveyance to the city upon the condition that if any betterments were assessed upon their remaining land on account of the laying out and construction of the park such betterments should be assumed by the city of Boston. In 1897 the street commissioners of Boston laid out Columbia Road as a highway from Franklin Park to Marine Park, a distance of five miles, which for the sixteen hundred feet referred to was superimposed upon Dorchesterway. All of Dorchesterway, except twenty feet in width, was designated by the order laying out Columbia Road, under statutory authority, as being under the "charge and control" of the park commissioners as a parkway, and no physical change was made in the portion of the Columbia Road adjacent to the petitioner's land which formerly was Dorchesterway. *Held*, that, assuming, for the purposes of decision, that a petition for a writ of certiorari would have been a proper remedy to correct a wrongful assessment of betterments, the fact that Columbia Road for a comparatively short distance happened to be coincident with the pre-existing parkway did not prevent its laying out from being a wholly new one, by which the older and lesser taking was extinguished, and that it could not be said as matter of law that no benefit accrued to the land of the petitioner by reason of the new layout. *Leahy* v. *Street Commissioners*, 316.

6. A deed given to the city of Boston by the owner of land which the board of park commissioners of that city in 1890 had taken for park purposes, contained the following: "This conveyance is made upon the express condition that if any betterments are assessed upon the estates belonging to the" landowner "on account of the laying out and construction of said park, said betterments shall be assumed by said city of Boston." A parkway called the Strandway was constructed adjacent to the remaining land of the landowner and, at the time of the taking by the park commissioners and of the execution of the deed by the landowner, the park commissioners contemplated a system of parkways of which the Strandway should form a link, connecting Marine Park at South Boston with Franklin Park. But the scheme was changed, and under authority given by

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St. 1897, c. 394, the street commissioners of the city of Boston laid out Columbia Road as a public highway, about five miles in length, from Franklin Park to Marine Park, and included as a part of it the Strandway, which by an order of the street commissioners under authority given them by the statute was placed under the "charge and control" of the board of park commissioners. No change was made in the physical appearance of the Strandway so far as it was included within the layout of Columbia Road, and the only change wrought by the layout was to open one of the drives of the Strandway to general traffic instead of leaving it restricted as a parkway. The board of street commissioners levied a betterment assessment on the remaining land of the landowner on account of the laying out and construction of Columbia Road. The landowner brought a suit in equity against the city of Boston, to compel it to assume this assessment under the condition or agreement, quoted above, in the deed accepted by the city. *Held*, that, assuming that a suit in equity was the proper remedy to enforce the terms of the deed, which was not decided, the assessment by the street commissioners for the laying out and construction of Columbia Road as a highway was not within the terms of the deed, which related only to assessments for the laying out and construction of a park by the park commissioners. *Phillips* v. *Boston*, 329.

On Successions and Inheritances.

7. The tax upon successions and inheritances is an excise tax, imposed not only upon the right of the owner of property to transmit it after his death, but upon the privilege of his beneficiaries to succeed to the property thus dealt with. *Attorney General* v. *Stone*, 186.
8. By the will of one who died in 1893 the residue of the testator's estate was given to a trustee with provisions for the expenditure of the income until the happening of certain contingencies, when the principal was to be divided among the children of the testator's brother. By St. 1891, c. 425, the Commonwealth was entitled upon the death of the testator to receive a tax upon the bequests to the children, to be assessed upon their value at that time and to be paid by the executor or trustee within two years from his giving bond. St. 1902, c. 473, provided among other things that, in cases of devises or bequests, which were liable to a collateral inheritance tax, and which did not take effect in possession until after the expiration of life estates or terms of years, the tax should "not be payable nor interest begin to run thereon until the person or persons entitled thereto" should "come into actual possession of such property, and the tax thereon shall be assessed upon the value of the property at the time when the right of possession accrues to the person entitled thereto as aforesaid, and such person or persons shall pay the tax upon coming into possession of such property. The executor or administrator of the decedent's estate may settle his account in the Probate Court without being liable for said tax." The contingencies referred to in the will happened in 1904 and a nephew of the testator received $15,000. No tax under St. 1891, c. 425, had been paid. Upon an information in equity against the

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nephew by the Attorney General at the relation of the Treasurer and Receiver General, it was *held*, that St. 1902, c. 473 was not open to the objection that it impaired vested rights of property, or that it caused unreasonable and unjust discrimination, or that it denied to the respondent the equal protection of the laws, and was not unconstitutional for those reasons; nor was its constitutionality affected by the facts that it applied only to cases in which the tax had remained unpaid, and that, whereas by St. 1891, c. 425, the trustee was required to pay the tax, by St. 1902, c. 473, the defendant was made liable therefor personally. *Attorney General* v. *Stone*, 186.

9. A testator died in 1893 and by his will directed that the residue of his estate, after the happening of a contingency, should be given to his nephew. The contingency happened and the nephew received $15,000 in 1904. Although a collateral legacy tax was due to the Commonwealth under the provisions of St. 1891, c. 425; St. 1902, c. 473, none was paid and in 1910 the Attorney General at the relation of the Treasurer and Receiver General brought an information in equity against the nephew to compel the payment of the tax and contended that under St. 1902, c. 473, interest should be paid upon the tax from the date when the nephew received the money, and that that statute was not affected by St. 1909, c. 527, § 10, which made amendments of St. 1907, c. 563, §§ 4, 7, contained in §§ 2, 4, of the 1909 statute, "apply to all cases in which the tax" remained "unpaid at the date of the passage" of the 1909 statute. St. 1907, c. 563, § 4, made such a tax payable at the expiration of one year from the time when the right of possession accrued. *Held*, that the statutes of 1907 and 1909 were intended to deal with the whole subject of taxation of successions, that the language of St. 1909, c. 527, § 10, should receive the general application which its words import, and therefore that interest was not due from the defendant until 1905. *Ibid.*

10. By the will of one who died in 1893, certain property was given to a trustee to be paid to the testator's nephew at the termination of a life estate. The final account of an administrator with the will annexed, showing the payment of the trust fund to the trustee, was allowed by the Probate Court in 1896 without the collateral succession and inheritance tax, imposed by St. 1891, c. 425, and required to be paid by the administrator or trustee, being paid, and without any proceedings being taken in accordance with § 18 of that statute to make the Commonwealth a party to the proceedings with regard to the estate. After the passage of St. 1902, c. 473, making the tax due from and payable by the beneficiary upon his coming into possession, the estate was distributed by the trustee and his final account was allowed without the tax being paid. *Held*, that the right of the Commonwealth to insist upon the nephew paying the tax was not affected by the allowance of the accounts of the administrator and of the trustee, the Commonwealth being in no sense a party to the proceedings in the Probate Court. *Ibid.*

11. A decree of the Probate Court, allowing the accounts of an administrator and ordering a distribution of the estate of his intestate, where there was no reference in the proceedings to an inheritance tax and no provision was

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made for its payment and the Commonwealth was not made a party to the proceedings by its consent or in the manner provided by St. 1891, c. 425, § 18, is no defense to an information by the Attorney General at the relation of the treasurer and receiver general for the collection of an inheritance tax to which the estate is subject under the provisions of St. 1891, c. 425. Following Attorney General *v.* Stone, *ante*, 186. *Attorney General* v. *Rafferty*, 321.

12. A testator, who died in October, 1909, by his will gave $2,600 to be divided equally between two nephews. A controversy as to the allowance of the will having arisen between the nephews and one, who was sister of the testator and his only other heir at law, and an agreement of compromise having been made between them by which the sister should receive $1,300 and each of the nephews $650, the Probate Court under R. L. c. 148, § 15; St. 1903, c. 222, § 1, by a decree adjusted the controversy in accordance with the agreement and on a petition by the executor of the will also ordered that the succession tax, assessed under St. 1909, c. 490, Part IV. § 1, should be assessed only on the $1,300 which, according to the decree of compromise, was given to the testator's sister, adjudging the shares given to the nephews to be exempt because they were less than $1,000 each. On appeal by the treasurer and receiver general to this court, it was *held*, that the tax should be assessed upon the property as it was disposed of by the will and not as it was disposed of by the decree making the compromise effectual; and that the executor therefore should pay a tax on the entire $2,600. *Baxter* v. *Treasurer & Receiver General*, 459.

13. Rice *v.* Bradford, 180 Mass. 545, holding that property of Bowdoin College was subject to the tax on successions and inheritances imposed by St. 1891, c. 425, necessarily decided that that College was not an institution "incorporated within this Commonwealth" within the meaning of that phrase as used in Rev. Sts. c. 7, § 5, cl. 2, afterwards re-enacted in successive statutes and embodied in R. L. c. 15, § 1. *Batt* v. *Treasurer & Receiver General*, 319.

14. A transfer of property by a trust deed may have been "made or intended to take effect in possession or enjoyment after the death of the grantor" and thus be subject to a succession tax under St. 1909, c. 490, Part IV. § 1, although the grantor reserved no power of revocation, unless the property passed to the beneficiary with all the attributes of ownership independently of the death of the grantor. *State Street Trust Co.* v. *Treasurer & Receiver General*, 373.

15. In order to bring a transfer by a trust deed, which is made or intended to take effect in possession or enjoyment after the death of the grantor, within the exception contained in St. 1909, c. 490, Part IV. § 1, of "cases of a *bona fide* purchase for full consideration in money or money's worth," so as to exempt the transfer from the payment of a succession tax, it is not enough that there should have been a valuable consideration, but the consideration also must have been adequate, and, if it consisted of services rendered to the grantor, their value may be inquired into, in a suit in equity by the trustee for instructions as to whether the tax should be paid, for the purpose of ascertaining whether the services rendered fulfil the requirement

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Tax (*continued*).

of the statute by equalling or exceeding in "money's worth" the value of the property transferred. *State Street Trust Co.* v. *Treasurer & Receiver General*, 373.

16. A widow advanced in years and in feeble health desired to secure during her life the services and companionship of a certain man, fifty-four years of age, who was employed as a travelling salesman at a salary of $2,200 a year in addition to his travelling expenses. In consideration of his resigning this position and removing with his wife to the widow's residence, where they continued to live and to care for her until her death, the widow deposited with a trustee $100,000, face value, of three and one half per cent bonds of the Commonwealth of Massachusetts, with a declaration of trust directing the trustee to pay the income during her life in equal shares to the man and his wife, and upon her death to transfer the bonds to them in equal shares absolutely if they both survived her, or, in case at the time of the settlor's death either of the beneficiaries should be dead, to transfer the whole of the bonds to the survivor, or, in case the settlor should survive both the beneficiaries, then at her death to transfer one half of the bonds as one of the beneficiaries should have appointed by his will and the other half as the other beneficiary should have appointed by her will, or in default of appointment by either of them, to his or her next of kin. At the time of the settlor's death, the bonds had an actual market value of not less than $90,000. Upon a bill in equity by the trustee for instructions, it was *held*, that the transfer of the bonds under the deed of trust did not constitute "a *bona fide* purchase for full consideration in money or money's worth" within the exception contained in St. 1909, c. 490, Part IV. § 1, and consequently that the transfer was subject to a succession tax under that statute. *Ibid.*

Exemption.

17. Under R. L. c. 12, § 5, cl. 8, now St. 1909, c. 490, Part I. § 5, cl. 8, exempting from taxation "the personal property of literary, benevolent, charitable and scientific institutions," the word "property" includes the equitable interest of a corporation, organized "for the purpose of furnishing education in the mechanical arts," in a trust fund created by a will, the entire income of which is paid to the corporation quarterly by the trustees under the will, and such fund therefore is exempt from taxation, it being immaterial that, if the fund were taxable, the tax, under § 23 of the same statutes, would be assessed to the trustees and not to the corporation. *Watson* v. *Boston*, 18.

18. *It seems*, that, if the question, whether property of Bowdoin College is exempt from taxation by the laws of this Commonwealth, were an open one, instead of having been settled adversely to the college, this court would hold that, although the college was incorporated by this Commonwealth before St. 1819, c. 36, called the Separation Act, and its charter cannot be modified or changed by the State of Maine, nevertheless after the passage of that act it ceased to be an institution incorporated within this Commonwealth within the meaning of Rev. Sts. c. 7, § 5, cl. 2, and its subsequent re-enactments. *Batt* v. *Treasurer & Receiver General*, 319.

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Collection.

Trustee, to whom corporation had mortgaged certain real estate to secure bonds, upon corporation property being placed in hands of receiver who refused to pay tax upon real estate, paid tax and was held to be subrogated both to right of corporation as to lien upon land and also to right of tax collector as respected funds in hands of receiver, see EQUITY JURISDICTION, 13.

Sale.

Advertisement.

19. A publication of the advertisement of a tax sale required by St. 1909, c. 490, Part II. § 39, in the English language in a newspaper not printed in that language, renders the sale invalid. *Conners* v. *Lowell*, 111.

20. While the description of certain land in an advertisement of a sale of the land for nonpayment of taxes must be such as to enable both owner and bidder to locate the land with substantial certainty, it need not be so detailed as to point out visually the precise boundaries of the land so that an utter stranger, unacquainted with the locality and ignorant of the neighbors, could find it without inquiry. *Ibid.*

Recording by purchaser of name, residence and place of business.

21. A sale of land in a city for the collection of a tax assessed to a person not in possession but holding a deed thereof which is valid on its face and which was given by the collector of taxes after a sale of the land for the collection of a tax assessed in a previous year, is not invalid by reason of the fact that the holder of the first tax deed failed by inadvertence to file in the registry of deeds or with the treasurer of the city where the land was situated the statement of his residence and place of business required by R. L. c. 13, § 45, now St. 1909, c. 490, Part II. § 46. *Conners* v. *Lowell*, 111.

Purchaser's remedy where sale is defective.

22. The remedy against a city or town given by R. L. c. 13, § 44, to a purchaser at a tax sale, who finds that, by reason of an error, omission or informality in the assessment or the sale, he has no claim to the property purchased, is an exclusive one, of which he can avail himself only by offering in writing to the collector, within two years after the date of his deed, to surrender and discharge his deed or to assign and transfer to the city or town all his right, title and interest in the premises as the collector shall elect; and, where he has not made such an offer within the required time, he cannot maintain an action against the collector on the warranty, inserted in the deed under the requirement of R. L. c. 13, § 43, that the sale in all particulars was conducted according to law. *Williams* v. *Baker*, 92.

Disclaimer by collector and resale.

23. Under the provision of R. L. c. 13, § 72, that if the collector of a town or city has reasonable cause to believe that a tax title held by the town or city "is invalid by reason of any error, omission or informality in the assessment, sale or taking, he may disclaim and release such title by an instrument under his hand and seal, duly recorded in the registry of deeds,"

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a defect, consisting of an incorrect recital in the collector's deed to the town or city, is a defect in the sale, of which the deed was the culminating act, and constitutes an invalidity in the sale which gives the collector a right to disclaim the title under the statute. *Nickerson* v. *Hyde Park*, 365.

24. Where the collector of a town or city has disclaimed a tax title of such town or city under R. L. c. 13, § 72, because he had reasonable ground to believe that such title was invalid by reason of an error, omission or informality in the assessment, sale or taking, he has power, where the two years during which the lien continues have not expired, to advertise the property again for sale and to sell and convey it with correct formalities, giving a good tax title. *Ibid.*

Deed.

Requirements in general.

25. A tax deed of real estate, when not in the language of St. 1909, c. 490, Part II. § 89, number 14, in order to be valid as a suitable instrument of conveyance, must set out either in precise phrase or by fair intendment to a reasonable certainty a statement of performance of all those acts which are essential to a legal cause for selling the real estate at the time when the sale took place. *Conners* v. *Lowell*, 111.

Statement of names of owners.

26. Certain land in a city properly was assessed in a certain year to the "heirs of W." The records of the Probate Court where the land was situated showed at the time of the assessment what the names of the "heirs of W" were. Subsequently the land was sold for non-payment of the tax and in the tax deed the collector of taxes stated that demand for the tax was made upon "the heirs of W" without stating their names. *Held*, that in ascertaining the name of the owners of the land, which by the statute must be stated in the advertisement for the sale, the collector was chargeable with knowledge of what might have been found upon the probate records, and therefore that the omission of such names from the deed in question rendered it invalid. *Conners* v. *Lowell*, 111.

27. A tax deed, which omits to state that the advertisement of the sale contained, as required by St. 1909, c. 490, Part II. § 89, "the names of all owners known to the collector," is invalid. *Ibid.*

Statement of cause of sale.

28. A tax deed dated July 21, 1908, which contains a statement that the advertisement of the tax sale was for the sale of "the smallest undivided part of said estate" sufficient to discharge the lien, and that the sale was of the whole and not of any undivided part, is invalid because it is defective in the statement of a cause for the sale of the whole of the land. *Conners* v. *Lowell*, 111.

Statement of purpose of sale.

29. A tax deed dated July 21, 1908, is not rendered invalid because in the narration contained therein of the terms stated in the advertisement of the tax sale it was stated that the sale would be for "non-payment" of taxes,

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instead of for their "discharge and payment," which are the words used in R. L. c. 13, § 87, form numbered 14. *Conners* v. *Lowell*, 111.

Statement as to posting and publication of notices and advertisements.

30. The omission in a tax deed, signed by the collector of taxes of Lowell, and containing a statement that the notice of sale was posted "in city hall, a public place in said Lowell," of a further statement that the city hall was, as is required by St. 1909, c. 490, Part II. § 41, a "convenient" place for such publication, does not invalidate the deed. *Conners* v. *Lowell*, 111.

31. A tax deed, bearing the superscription, "Commonwealth of Massachusetts," and signed by one entitling himself "Collector of Taxes for" a certain city, is invalid if the newspaper in which the notice of sale was published is described as "L'Etoile," without any further assertion as to the place of publication than that it was "in the county where said real estate lies," the deed not expressly stating where the real estate lies. *Ibid.*

32. In a tax deed bearing the superscription, "Commonwealth of Massachusetts," and signed by one entitling himself "Collector of Taxes for the City of Lowell" a description of the newspaper in which the notice of the tax sale was published as the "Lowell Sun," or the "Lowell Daily Telegram," without any further assertion as to the place of publication than that it was "in the county where said real estate lies," does not make the deed invalid, although there is no express statement in the deed of the city or town within which the real estate lies, because the city where the newspaper was published is sufficiently indicated. *Ibid.*

Description of land.

33. If a certain lot of land, which was sold at a tax sale and is not of the character described in St. 1909, c. 490, Part II. § 50, is described in the deed of the tax collector as being the whole or a part of a lot of a certain number, with the name of the street and the side of the street upon which it is located and the names of all abutting owners with the general points of compass on which the land of the abutting owners lies, but without further designation by metes and bounds and without reference to any plan upon which the lot as numbered may be found, the description is sufficient. *Conners* v. *Lowell*, 111.

34. If a certain lot of land in a city which was sold at a tax sale and is not of the character described in St. 1909, c. 490, Part II, § 50, is described in the deed of the tax collector only by its area in square feet, more or less, the street and the side thereof on which it is located and a certain lot number without reference to any plan, such description is insufficient and the deed is invalid on its face, although there is a private plan on record at the registry of deeds of the county in which the land is situated and at the office of the city engineer, on which the lot could be sufficiently identified. *Ibid.*

TOWNS AND CITIES.

See MUNICIPAL CORPORATIONS.

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TRESPASS.

Violation of statute requiring operator of automobile upon highway to be licensed is merely evidence of negligence on part of operator and does not make him trespasser upon highway, see NEGLIGENCE, 38.

TRUST.

What constitutes.

Suit in equity, which could not be maintained for specific performance of alleged oral promise to assign lease because such assignment would violate covenant of lease and to compel it would be nugatory and inequitable, also was held not to be maintainable to cause defendant to be declared to be holding lease in trust for plaintiff, see EQUITY JURISDICTION, 11, 12.

Suit against administrator with will annexed and beneficiaries of estate of certain decedent to fix upon funds in hands of administrator equitable charge, in accordance with agreement with plaintiff, for claim of plaintiff for procuring establishment of rights in decedent's estate of certain defendants who were beneficiaries, see EQUITY JURISDICTION, 8, 25–28.

Certain directions in will to "trustees" were held to be directions to executors, no appointment of trustees being necessary, see DEVISE AND LEGACY, 2.

Certain testator by his will devised and bequeathed entire residue of his estate to executor "to have and to hold . . . without the intervention of any trustee" during his life, and provided that on executor's decease "whatever may be remaining" of the residue should be given to certain town. After death of executor account was filed in his behalf stating that he had paid residue over to himself, which was held proper under terms of will without intervention of trustee or order of distribution, see EXECUTOR AND ADMINISTRATOR, 1.

Construction.

1. A testator, among other provisions for a son who was a minor when the will was made, provided as follows: "and upon my said son's arrival at the age of twenty-one, provided I am not then living, said trustees shall pay to him out of the principal of said trust fund the sum of five thousand dollars." When the son arrived at the age of twenty-one years the testator was living. The son survived his father. *Held*, that the legacy of $5,000 never became payable and never could become so. *Pope* v. *Pope*, 432.

2. A testator in the residuary clause of his will established a trust which contained this provision for his children: "To each of my surviving children who shall be of age at the time of my decease, and to any child of mine who shall be a minor at the time of my decease when he shall attain his majority, an annually increasing income, the amount of which shall be dependent upon the age of such child, and shall be determined as follows, to wit: $3,000 a year at the age of twenty-one years, with an increase of

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$1,000 a year thereafter for ten years: For instance, a child who shall be twenty-one years old at the time of my decease will receive an income at the rate of $3,000 a year, at the age of twenty-two $4,000 a year, and so on, till at the age of thirty years a child would receive the maximum income, viz., $12,000 a year." Upon a bill by the trustee for instructions as to whether the increase of $1,000 a year should be continued for ten years after a child reached the age of twenty-one years, as directed in the first clause of the paragraph, making $13,000 a year in the thirty-first year of such child's age, or whether, as directed in the last clause of the paragraph, the maximum should be reached in the thirtieth year and should be $12,000 a year, it was *held*, that the first clause must yield to the last so far as it was inconsistent with it, making the maximum income $12,000 and thirty years the age beyond which there was to be no increase. *Pope* v. *Pope*, 432.

Determination of beneficiaries under certain trust, see DEVISE AND LEGACY, 5.

Conveyance in trust, where, although grantor reserved no power of revocation, property was held not to have passed to beneficiary with all attributes of ownership independently of death of grantor, so that, beneficiary not being "*bona fide* purchaser for full consideration in money or money's worth," succession tax should be paid, see TAX, 15, 16.

Trustee's Duties as to Preservation of Mortgaged Trust Property.

3. A suit in equity by the beneficiaries of a real estate trust against two, who were the trustees, for an accounting was referred to a master who found the following facts: The trust property consisted of a hotel in Boston worth about $500,000. Under the trust instrument shares were issued to the beneficiaries to represent their interests in the trust. The owner of a majority of the shares, one P, who was not a party to the suit, had procured the appointment as one of the two trustees of his confidential secretary and bookkeeper, who did not appear to have been possessed of any knowledge as to the duties of a trustee or to have had any experience in the management of real estate, and who "must have regarded this service only as one of the many which he was employed to render to" P "and for which he looked to" P "for compensation." He became the managing trustee. The other trustee was old and partially blind. Neither trustee had any other interest in the trust than as trustee. The trust property was subject to a first mortgage for $250,000 and a second mortgage for $50,000. The second mortgage had been held by a former trustee. It came due about the time that P procured the election as trustee of his nominee. The managing trustee "did not realize that" the mortgage "ought to be paid," and no effort was made to renew it. The original mortgagee having died, the mortgage had been assigned by his son, who had succeeded to the mortgage title, to a stranger to the trust without the knowledge of the trustees and the assignment was not recorded for some years. After it had been overdue for about five years a financial panic occurred and the assignee demanded payment. Both the trustees and P and the original mortgagee's son sought funds with which to save the prop-

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erty from a sale. The mortgagee's son found one who offered to lend the necessary amount although he demanded a bonus of $5,000 and twelve per cent interest per year. This offer was communicated to both trustees. The managing trustee and P and their personal counsel considered what should be done without consulting with the other trustee and, without informing him, decided to attend the sale, to bid the property up to about $80,000 above the first mortgage, and then to let it go. They did so and the property was sold for $77,250 above the first mortgage. In the transaction, the managing trustee not only "kept" his co-trustee "in the dark, but . . . actually misled" him. The property was worth $100,000 more than it was sold for. *Held*, that both trustees were personally chargeable for the $100,000 thus lost. *Ashley* v. *Winkley*, 509.

Payments of Income.

4. By the express provision of R. L. c. 141, § 24, beneficiaries under a trust created by will to whom gifts of annual income are made are entitled to such income from the death of the testator. *Pope* v. *Pope*, 482.

Accounting by Trustee.

5. In a suit in equity by a beneficiary under an express trust against the trustee for an accounting, the burden is upon the defendant to show that in the discharge of his duties he has exercised reasonable skill, prudence and judgment. *Ashley* v. *Winkley*, 509.
6. A suit in equity by the beneficiaries of a real estate trust against the trustee for an accounting was referred to a master, who found the following facts: The trust property consisted of a hotel which for a number of years had been leased to a tenant who, about six years before the commencement of the suit, had become $20,000 in arrears in his rent. About a year later, the tenant being still in arrears about $19,000, the trustee dispossessed him. Shortly thereafter the tenant died insolvent. The trustee then placed a manager in the hotel to run it on behalf of the trust. In doing so, certain furniture which had been used by the tenant was taken possession of by the trustee. A liquor license under which the tenant had operated the hotel had been issued in the name of his wife. Of $60,000 worth of furniture which he had used in the hotel, $16,000 worth had been purchased by him subject to a right of the vendor to resume possession on non-payment of the purchase price, of which the tenant owed $12,000 at the time of his death. The widow of the tenant claimed title to the rest of the furniture, and, "on advice of able and competent counsel," the trustee settled her claim by paying her $4,000. At the hearing before the master the trustee gave no other explanation of his action. *Held*, that upon the findings of the master it did not appear that the settlement with the tenant's widow was so injudicious or unwarranted that the trustee should be charged personally with the amount he paid her. *Ibid.*
7. A suit in equity by the beneficiaries of a real estate trust against the trustee for an accounting was referred to a master, who found the fol-

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lowing facts: The trust property consisted of a hotel which about six years before the commencement of the suit was held by a tenant who was $19,000 in arrears in his rent. Friends of the tenant then took charge of the hotel and ran it with the tenant as manager until he died, hopelessly insolvent, when the trustee placed a manager in charge and ran it for the trust. In doing so, he took possession of certain supplies which belonged to the tenant's friends. The friends owed the trust for rent $3,933, and, upon their making claim upon the trustee for the supplies of which he had taken possession, he settled with them by paying to them $2,810. The entry in the trustee's cash book was "Supplies and equity all that" the tenant's friends "owned, $2,810." What the value of the supplies was did not appear. The only explanation given by the trustee of his action was that he acted in accordance with the advice of able and competent counsel. *Held*, that upon the findings of the master it did not appear that the settlement with the tenant's friends was so injudicious or unwarranted that the trustee should be charged personally with the amount he paid them. *Ashley* v. *Winkley*, 509.

8. A suit in equity in the Superior Court by the beneficiaries of a real estate trust against two, who were the trustees, for an accounting was referred to a master who found the following facts: The trust property consisted of a hotel in Boston worth about $500,000. Under the trust instrument shares were issued to the beneficiaries to represent their interests in the trust. The owner of a majority of the shares, one P, who was not a party to the suit, had procured the appointment as one of the two trustees of his confidential secretary and bookkeeper, who did not appear to have been possessed of any knowledge as to the duties of a trustee or to have had any experience in the management of real estate, and who "must have regarded this service only as one of the many which he was employed to render to" P "and for which he looked to" P "for compensation." He became the managing trustee. The other trustee was old and partially blind. Neither trustee had any other interest in the trust than as trustee. Five years before the commencement of the suit the trustees had dispossessed a tenant who had been in possession of the hotel for many years and who was $19,000 in arrears in rent, and, being unable to find a new tenant, had placed a manager in charge to run the hotel for the trust. In doing so they had taken possession of the furniture which had been used by the tenant. All but $4,000 worth of this the tenant had procured at a price of $56,000, subject to a right of the vendor to resume possession on non-payment of the purchase price, on which he had paid $44,000. For failure of the tenant to pay the entire purchase price the vendor then took possession of the furniture and claimed title to it. The managing trustee was absent from the Commonwealth on P's business and the master found that "The furniture matter was, as might have been expected, handled by P." The remaining $4,000 worth of furniture was claimed by the tenant's widow, and, under advice of competent counsel, the trustees paid her that amount. They then conveyed that furniture to P for $5,000. He purchased the other furniture from the vendor for $12,000. At a later date, when the trustees had found a tenant, P sold the furniture to the tenant

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for $9,000 and made a claim upon the trustees for the $8,000 actual loss on his advances and for $400 a month for thirteen months during which the trustees had used the furniture in the hotel under their own management. The trustees paid the amount demanded, and later signed a paper, antedated to correspond with the date of the transaction and purporting to be a vote by them to make the payment in accordance with a previous oral contract under which the new tenant was procured and "to reimburse" P "for his loss sustained in behalf of the" trust property "in the sale of the furniture, and for the use of the same." The master found that the payment of $8,000 to P to reimburse him for cash lost in the transaction was warranted, but that the payment of $400 a month for the use of the furniture was unwarranted, five per cent on the amount invested being sufficient. The defendants excepted to the master's findings. The judge of the Superior Court overruled the exceptions, and the defendants appealed. *Held*, that the trustees should be charged in accordance with the master's report. *Ashley* v. *Winkley*, 509.

9. In a suit in equity by several of the beneficiaries of a real estate trust against the trustees for an accounting, in which the defendants were held to be liable for a loss sustained by the trust by reason of a sale during a financial panic of the property of the trust in foreclosure of a second mortgage which should not have been allowed by the trustees to become overdue, it appeared that about ten years before the sale the mortgage had been held by a former trustee of the trust and that shortly thereafter the mortgagee had died and the mortgage had become overdue. Both trustees thought that the mortgage continued to be held by one of two sons of the original mortgagor, who had succeeded to his father's title, and checks to pay interest had been sent to the son. About five years before the foreclosure, the mortgage had been assigned by the son to a stranger to the trust. The trustees had not been informed of the assignment and it was not recorded for some years. One of the plaintiffs was a corporation, shares in which were owned or controlled equally by the two sons of the original mortgagor. *Held*, that the corporation was not estopped from sharing in the distribution of the amount recovered in the suit because of the action of the owner of one half of the shares of its capital stock. *Ibid.*

10. In a suit by several beneficiaries of a real estate trust against the trustees for an accounting, it appeared that shares were issued to the beneficiaries in proportion to their investments therein, and that the trust had suffered losses by reason of neglect and mismanagement on the part of the trustees which were participated in and in the main caused by one P, the owner of two thirds of the shares of the trust. *Held*, that the defendants should pay to each of the plaintiffs such a portion of the loss sustained by the trust as his shares bore to the total of the shares issued; but that the trustees should not be charged with the proportion of the loss represented by shares formerly owned by P. *Ibid.*

Trustee's Ignorance of Duties no Excuse.

11. Ignorance on the part of a trustee of an express trust as to the scope of his duties or as to the legal requirements of his office does not free him

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from liability for losses sustained by the trust by reason of a breach of such duties on his part or a failure to fulfil the requirements of his office. *Ashley* v. *Winkley*, 509.

Liability of Co-trustee.

12. Although one of two trustees of a real estate trust is not responsible for acts or misconduct of a co-trustee, who is the managing trustee, in which he has not joined or to which he does not consent or which he has not aided or made possible by his own neglect, he is chargeable for losses resulting from his failure to inform himself of business transactions involved in the execution of the trust even if he is deceived and purposely kept uninformed by the managing trustee, because he cannot properly discharge his duty by surrendering the substantial or entire control of the trust to the managing trustee, and this is especially true where with the co-trustee's knowledge the managing trustee is entirely under the control of the owner of a majority of the interest of the beneficiaries and is used by such owner to further his own ends at the expense of the trust. *Ashley* v. *Winkley*, 509.

Disposition of Real Estate after Termination of Trust.

13. If real estate is devised to a trustee in trust to pay the income to certain named children of the testator until the death of the survivor of them, and an intention of the testator is apparent from a reading of the whole will, although it is nowhere expressed therein in terms, that, if after several of the children had died leaving issue the survivor should die without issue, then the trust estate should pass to the grandchildren of the testator in equal shares and to the issue of deceased grandchildren by right of representation, upon the happening of such a contingency the fee of the real estate does not pass to those entitled thereto without further action of the trustee, but he should convey it to them. *Sanger* v. *Bourke*, 481.

Taxation.

Exemption from taxation of equitable interest of literary, benevolent, charitable or scientific institution in trust fund created by will, see TAX, 17.

Review of legislation with regard to whether tax upon property held in trust should be assessed to trustee or to beneficiary, see TAX, 8.

Trustee's Bill in Equity for Instructions.

In trustee's bill for instructions, no instructions will be given as to state of affairs which has not arisen, see EQUITY JURISDICTION, 9, 10.

UNDUE INFLUENCE.

Executor of will has no power to ratify deed of testator made when he was of unsound mind or under undue influence, see EQUITY JURISDICTION, 21.

It is province of master, before whom is being tried suit to set aside conveyance on grounds of grantor's unsoundness of mind and of undue influence

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of defendant upon him, to fix limit of time relating to which evidence of grantor's mental condition will be received, see EVIDENCE, 8.

Fact, that seven years after making deed grantor made will which after his death was allowed, is not conclusive evidence on issues in suit in equity to set aside deed because it was procured by undue influence or fraud or was made while grantor was of unsound mind, see EQUITY JURISDICTION, 22.

UNFAIR COMPETITION.

1. Although a manufacturer of bread has no exclusive right to manufacture and sell loaves of a peculiar size, shape and visual appearance for which he has gained a wide and favorable reputation, and other manufacturers and dealers can manufacture and sell loaves of the same size, shape and visual appearance if they adopt adequate means of distinguishing their loaves from those of the first manufacturer so that the ordinary purchaser will not be deceived, the first manufacturer by a suit in equity can enjoin any one from offering for sale without adequate distinguishing marks or characteristics loaves so similar to his as to be likely to mislead the ordinary purchaser into thinking that the defendant's bread was the plaintiff's. *George G. Fox Co.* v. *Best Baking Co.* 251.
2. A manufacturer of bread brought a suit in equity to restrain another manufacturer from offering for sale loaves of bread so closely resembling the loaves manufactured by the plaintiff as to be likely to mislead the ordinary purchaser into thinking that the defendant's bread was the plaintiff's bread, and this court held, in George G. Fox Co. *v.* Hathaway, 199 Mass. 99, that the plaintiff was entitled to an injunction because the loaves offered for sale by the defendant did resemble those manufactured by the plaintiff as the plaintiff alleged and the defendant did not take adequate precautions to distinguish them. In a subsequent suit of the same character by the same plaintiff against a different defendant, a master found that "the defendant's loaves . . . are, except for slight differences in the labels, substantially the same in appearance as those in question" in the first suit, but that, "upon all the facts . . . the defendant's loaves . . . were not so similar to" those manufactured by the plaintiff "as to be likely to deceive the ordinary purchaser, having some knowledge of the appearance" of the loaves manufactured by the plaintiff, "or to constitute an instrument of fraud in the hands of the retail dealer." *Held*, that the finding of the master was plainly wrong and that exceptions thereto must be sustained. *Ibid.*
3. The decision of this court in George G. Fox Co. *v.* Hathaway, 199 Mass. 99, that a manufacturer of bread in loaves of a peculiar shape, whose bread had gained a wide and favorable reputation and was known by its visual appearance, due, among other reasons, to its shape, which was "uneconomical, and less convenient and satisfactory generally for the cutting of slices for all kinds of uses than the shapes generally adopted," could maintain a suit in equity to enjoin another baker from offering for sale bread so similar to his as to deceive the ordinary purchaser, was *held* to apply in this case, which was a suit of the same character by the same plaintiff

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against a different defendant, and in which a master to whom the suit was referred found that the defendant was offering for sale loaves which, "except for slight differences in labels," were "substantially the same in appearance as those in" the first suit, although the master also found "that loaves of that shape were on the whole advantageous loaves to both the plaintiff and the defendant;" because the decision in the first case did not depend on the fact that the loaves manufactured by the plaintiff were "uneconomical," or "less convenient and satisfactory generally for the cutting of slices for all kinds of uses than the shapes generally adopted." *George G. Fox Co.* v. *Best Baking Co.* 251.

4. In a suit in equity by a manufacturer of bread to restrain another manufacturer from making and selling loaves of bread so similar to the plaintiff's in size, shape and visual appearance as to deceive the ordinary purchaser, it appeared that at one time the plaintiff had been deceiving the public by false and misleading advertisements as to the bread he manufactured, but that he had ceased to do so about a year and a half before the bringing of the suit. *Held*, that such facts alone did not prevent the plaintiff from maintaining the suit. *Ibid.*

UNSOUND MIND.

Fact, that seven years after making deed grantor made will which after his death was allowed, is not conclusive evidence on issues in suit in equity to set aside deed because it was procured by undue influence or fraud or was made while grantor was of unsound mind, see EQUITY JURISDICTION, 22.

It is province of master, before whom is being tried suit to set aside conveyance on grounds of grantor's unsoundness of mind and of undue influence of defendant upon him, to fix limit of time relating to which evidence of grantor's mental condition will be received, see EVIDENCE, 8.

Executor of will has no power to ratify deed of testator made when he was of unsound mind or under undue influence, see EQUITY JURISDICTION, 21.

VARIANCE.

See PRACTICE, CIVIL, 1; PRACTICE, CRIMINAL, 1, 2.

WAIVER.

At trial of action upon bond given by contractor to town, conditioned upon performance of contract which was not assignable by contractor except with assent in writing of sewer commissioners indorsed thereon, where it appeared that contractor had attempted to assign contract and assignee had performed some of work, but that no assent in writing to assignment had been given, evidence, tending to show that board of sewer commissioners knew and did not object to contract being performed by person other than contractor named therein, was held under circumstances not to be evidence that town assented to assignment of contract or waived contract's provisions, or of novation accepting assignee in place of contractor, see PRACTICE, CIVIL, 4.

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WARRANTY.

Remedy of purchaser at sale of real estate for collection of taxes, in case there is defect in sale, is not by action of contract against collector of taxes upon warranty in tax deed, but is to comply strictly with provisions of R. L. c. 13, § 44, see TAX, 22.

WATERCOURSE.

Owner of land was held under circumstances to be unable to maintain suit in equity against railroad corporation to enjoin it from constructing conduit in such way as to diminish flow of certain creek, act complained of being merely public nuisance, see EQUITY JURISDICTION, 30.

Nor, if injury in question is done in abolition of grade crossing under decree of court, has he any standing in equity for damages or to enforce decree, see GRADE CROSSING, 1.

WATER RIGHTS.

Owner of land was held under circumstances to be unable to maintain suit in equity against railroad corporation to enjoin it from constructing conduit in such way as to diminish flow of certain creek, act complained of being merely public nuisance, see EQUITY JURISDICTION, 30.

Nor, if injury in question is done in abolition of grade crossing under decree of court, has he any standing in equity for damages or to enforce decree, see GRADE CROSSING, 1.

WAY.

Private.

Various persons with right acquired in various ways.

1. A right of way may exist over the same land in favor of different persons who acquired their respective rights in different manners, some by grant, some by custom and some by prescription through adverse use. *Bigelow Carpet Co.* v. *Wiggin*, 542.

Way acquired by prescription.

2. From the fact of open, continuous and persistent user of a way over certain land, knowledge of such user, or acquiescence therein on the part of the owner of the land, can be inferred. *Bigelow Carpet Co.* v. *Wiggin*, 542.

3. Where an attempted dedication of certain land to use as a public way in 1841 failed because it was not accepted by the municipal authorities before the enactment of St. 1846, c. 203, which did away with the establishment of public ways by dedication, and after the enactment of that statute the owner of the land has assented to the use of the land as a way by certain persons for more than twenty years, a jury may find that such persons have gained a right of way over the land by adverse user, since the assent of the landowner may be found to have indicated, not the granting of a permission, but acquiescence in the exercise of a right inconsistent with unincumbered ownership on his part. *Ibid.*

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4. At a hearing in the Land Court before the repeal of St. 1905, c. 288, of a petition for the registration of the title to a strip of land adjoining other land of the petitioner, the respondent contended that he had acquired by prescription a right of way over the strip appurtenant to adjoining land owned by him, and the judge of the Land Court found and reported to the Superior Court in accordance with the respondent's contention. At the trial in the Superior Court on appeal from the Land Court of the issue, whether the respondent had acquired such a way by adverse user, the respondent relied on the report of the judge of the Land Court, and there also was evidence that in 1841 by an agreement under seal, which had been recorded, owners of the strip in question had attempted to dedicate it to the use of the public as a public street, that because it was not accepted by the municipal authorities before the enactment of St. 1846, c. 203, which did away with the establishment of public ways by dedication, it never became a public way by dedication, that from 1841 the strip continuously remained open, that since 1859 it had been paved and kept in repair by the petitioner and his predecessor in title, who had maintained there a sign with the words "Private Way" upon it, and that the respondent continuously and openly had used the strip as a way to and from his land. The judge of the Superior Court submitted the issue to the jury. *Held*, that the action of the presiding judge was right. *Bigelow Carpet Co.* v. *Wiggin*, 542.
5. If, after an attempt by the owner of a strip of land, by a deed under seal duly recorded, to dedicate it to the use of the public as a public way, which failed because there was no acceptance of the way by the municipal authorities before the enactment of St. 1846, c. 203, doing away with the establishment of ways by dedication, there was for over twenty-five years an open and uninterrupted use of the land by another landowner in connection with land of his near by, such landowner may acquire by adverse user a right to the use of the way, although after the failure of the consummation of the dedication the owner may have had an intention, which remained undisclosed, to withdraw the land from use other than in connection with his own land. *Ibid.*
6. Before 1846 the owner of certain land attempted to dedicate it to use as a public way but the dedication did not become effectual because the municipal authorities did not accept the way before the enactment of St. 1846, c. 203, which did away with the establishment of public ways by dedication. After 1859 the owner erected beside the way a sign reading, "Private Way," and a successor petitioned in the Land Court for the registration of an unincumbered title to the land. The Land Court decided adversely to the petitioner and he appealed. The judge framed for the trial in the Superior Court the issue, whether the respondent had obtained a right of way over the land by adverse user. *Held*, that the question, whether the maintenance of the sign was indicative of a purpose to withdraw the attempted dedication or to prevent the acquirement of a right to use the way, was for the jury. *Ibid.*
7. At the trial in the Superior Court of an issue framed on an appeal from the Land Court by the owner of certain land who sought to have his title

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Way (*continued*).

registered, the issue being, whether the respondent had acquired a right of way over the locus by adverse user, it appeared that the petitioner was the proprietor of a mill bordering on the locus, and evidence was offered by the respondent, for the purpose of showing that the petitioner had knowledge of the use of the way by him, which tended to show that a former superintendent of the petitioner's mill, who at the time of the trial was dead, had said that the passageway must be kept unobstructed for the use of the respondent. The evidence was admitted. *Held*, that the evidence was admitted rightly. *Bigelow Carpet Co.* v. *Wiggin*, 542.

8. At the trial in the Superior Court of an issue framed on an appeal from the Land Court by the owner of certain land who sought to have his title registered, the issue being, whether the respondent had acquired a right of way over the locus by adverse user, it appeared that the petitioner was the proprietor of a mill bordering on the locus, that the respondent owned land bordering on a way, an extension of which passed over the locus, and that continuously for over twenty years he had used the locus as a way, that the petitioner's predecessor in title before 1846 had attempted to dedicate the locus to use as a public way, but that the dedication had been ineffectual because it had not been accepted by the municipal authorities before the enactment of St. 1846, c. 203, which did away with the establishment of public ways by dedication, that thereafter the way was used practically only by those having business dealings with the petitioner and his predecessor in title and by the respondent and those having dealings with him. The petitioner at the trial contended that, as the dedication had failed, the way should be considered as appropriated and used for the exclusive occupation of himself and of those having business dealings with him, and the evidence offered was confined to that inquiry, the respondent contending only that he had a right to use the way in connection with his estate. The issue was determined in favor of the respondent, and the petitioner alleged exceptions. At no time did the petitioner admit that a public way had been established by prescription. *Held*, that the petitioner could not be heard to contend in support of his exceptions that the respondent could not prescribe for a right of way over the locus in connection with his estate because the land was used as a way by the public, such contention being inconsistent with his previous contention and with his petition, which sought the registration of an unincumbered title to the land. *Ibid.*

Way acquired by grant in deed.

9. Where an indefinite way has been granted by deed and either at the time of the grant or afterwards it is practically located and determined by common consent of the grantor and the grantee and as thus located is used and acquiesced in by all parties interested for a long term of years, the way so located and determined will be regarded as the way intended to be granted by the deed. *Cotting* v. *Murray*, 133.

10. The owner of a large tract of land in 1842 conveyed to one W a lot therefrom with a right of way from it over "a five feet passageway to be laid out by" the grantor to a street near by. Three months later he con-

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veyed to W other land adjacent to the first lot and bounded on one side by another "passageway not less than five feet wide leading to" the same street, it being stated in the deed that the second parcel was designed as an enlargement of the first, the deed also granting "a free and uninterrupted right of passing and repassing in, upon and over said passageway not less than five feet wide laid out by us . . . in common with us . . . said easements to be enjoyed as appurtenant to the land conveyed . . . both by these presents and by our said former deed." At the time of the second deed, the passageway mentioned therein was in existence and was twelve feet wide from the street to a point in the middle of the line of W's lot bounding thereon, and it continued through other land of the grantor five feet wide. Afterwards the grantor made it twelve feet wide to a point beyond W's lot and laid out an extension of it fifteen feet wide at right angles to it from a point just beyond W's lot. Each arm of the passageway ended in a *cul de sac*. The fifteen foot arm was rendered inaccessible to teams and carriages by posts at its entrance. A brick sidewalk four feet wide was built along the side of the original passageway by abutters who afterwards purchased lots from the tract along one side of it. From 1842 to 1892 W and his successors, with the common consent of the abutters, maintained a post in the way opposite his premises for the purpose of preventing teams and carriages from using the way beyond it. The way was paved with cobblestones by W and others at first only from the street to the post, and later beyond the post. From the street to the post the way was used for teams and carriages with the consent of all abutters on the passageway. In 1892 a successor in title to W removed the post and certain of the abutters sought in equity to restrain him from using the way for teams and vehicles, and to limit him to a five foot passageway. *Held*, that, because the wording of the second deed to W did not limit the way to five feet and it was treated by common consent by all parties as twelve feet in width, it must be regarded as of that width; and also that the setting up and maintenance of the post by W and his successors by common consent did not prevent a later successor of W from withdrawing his consent to such limitations of the use of the way or from insisting upon his right to use the entire way in front of his premises and to the street in the same way. *Cotting* v. *Murray*, 133.

Public.

In petition for certiorari, assessment of betterments from laying out and construction of Columbia Road in Boston was held not to be illegal although large portion of it, including portion adjacent to petitioner's land, was superimposed upon way formerly laid out and constructed as parkway, see TAX, 5.

Ruling to same effect in suit in equity, see TAX, 6.

Violation of law of road as evidence of negligence, see PRACTICE, CIVIL, 11.

Violation of statute requiring operator of automobile upon highway to be licensed is merely evidence of negligence on part of operator and does not make him trespasser upon highway, see NEGLIGENCE, 38.

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Way (*continued*).

Statement of principles of law relating to burden of proof in actions for personal injuries caused by negligence where plaintiff relies on circumstantial evidence, and application of them in action against street railway company for personal injuries caused by explosion of box of dynamite into which street car ran on public way, it being held that determination of responsibility for accident was left by evidence too much to conjecture, see EVIDENCE, 3; NEGLIGENCE, 20.

Action against owner of building, eaves on bay window of which overhung sidewalk so that drippings therefrom made ice on sidewalk upon which plaintiff slipped and fell, see NEGLIGENCE, 37; NUISANCE, 1, 2.

WILL.

1. A clause of a will directed that the residue of the testator's estate be equally divided between W and another. A codicil of the will provided that "all money left" to W should be held in trust by the executors, "the income to be paid her as they think best for her surport the Principle not to be used, unless necessary." W was one of the three attesting witnesses to the codicil. There was no clause in the codicil specifically revoking the will or any part thereof. *Held*, that the legacy to W in the codicil was to be considered by itself without reference to that contained in the will, the will not having taken effect when the codicil was made, and being revocable at any time before the testator's death, that the legacy was beneficial in its character, and therefore that, under R. L. c. 135, § 3, since there were not three subscribing witnesses to the codicil who did not receive a beneficial devise or legacy thereunder, the legacy to W in the codicil was void and the provision for her in the original will remained unchanged. *Lougee* v. *Wilkie*, 184.

Rights of wife in estate of husband who died testate, where she does not waive provisions of will, see HUSBAND AND WIFE, 1.

Intention of testator, though not expressed in terms, was held to be apparent in will read as whole, and was given effect, see DEVISE AND LEGACY, 1, 2.

Where one died testate and, controversy arising as to will, agreement of compromise is made and decree of Probate Court is entered in accordance therewith, tax on successions and inheritances should be assessed on property as disposed of under will and not as disposed of under decree of compromise, see TAX, 12.

WINNISIMMET COMPANY.

Chapters 188 and 345 of St. 1871, which gave Winnisimmet Company, corporation maintaining ferry between Boston and Chelsea, right to take certain property by eminent domain, also gave it right to take all easements appurtenant thereto, see EMINENT DOMAIN, 2.

WITNESS.

1. To justify the signing of a certificate of the attendance of a witness it is necessary that the person named as a witness should have attended and

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not merely should have been ready and willing to attend. *Boston Bar Association* v. *Scott*, 200.

2. Persons who have been told that their attendance as witnesses at a trial will be required but who pursue their ordinary occupations without interruption cannot be treated as witnesses merely because they are ready to attend court upon notification. To entitle a person to a witness fee there must be an actual attendance either at the court house or near it under circumstances which involve a real and appreciable interference with his everyday conduct. *Ibid.*

False and fraudulent certificates of attendance of witnesses, procuring of which caused attorney to be disbarred, see ATTORNEY AT LAW, 1, 3, 4.

Exception by plaintiff, which was held to be without merit, to action of trial judge with regard to allowing redirect examination of plaintiff, see PRACTICE, CIVIL, 12.

WORDS.

"Accompanied by." See *Bourne* v. *Whitman*, 155, 165.
"Actively negligent act." See *O'Brien* v. *Union Freight Railroad*, 449, 453.
"Added." See *Commonwealth* v. *Graustein & Co.* 38, 42.
"All windows in." See *Monahan* v. *William W. Babcock Co.* 13, 16.
"Appearing of record as owner." See *Conners* v. *Lowell*, 111, 123
"Approval." See *Brown* v. *Newburyport*, 259, 265.
"Assumption of risk." See *Berdos* v. *Tremont & Suffolk Mills*, 489, 497.
"Charge and control." See *Phillips* v. *Boston*, 329, 331.
"Convenient." See *Conners* v. *Lowell*, 111, 117.
"Damage to personal property." See *Keating* v. *Boston Elevated Railway*, 278, 282.
"Damage to the person." See *Keating* v. *Boston Elevated Railway*, 278, 282.
"Discharge and payment." See *Conners* v. *Lowell*, 111, 117.
"In full to date." See *Worcester Color Co.* v. *Henry Wood's Sons Co.* 105, 107, 109.
"Interest." See *Copeland* v. *Eaton*, 139, 143, 144, 146.
"Intersecting way." See *Commonwealth* v. *Cassidy*, 24, 29.
"Layout." See *Leahy* v. *Street Commissioner*, 316, 317.
"Milk." See *Commonwealth* v. *Boston White Cross Milk Co.* 30, 35, 36.
"Non-payment." See *Conners* v. *Lowell*, 111, 117.
"Payable." See *Bryne* v. *Bryne*, 179, 180.
"Pending." See *Worcester Color Co.* v. *Henry Wood's Sons Co.* 105, 111.
"Previous decease." See *Hall* v. *Hall*, 350, 353.
"Property." See *Watson* v. *Boston*, 18, 23, 24.
"Reported." See *Daly* v. *Foss*, 470, 473.
"Reserved." See *Daly* v. *Foss*, 470, 473.
"Riding with." See *Bourne* v. *Whitman*, 155, 165.
"Stable." See *Riverbank Improvement Co.* v. *Bancroft*, 217, 220, 221, 222.
"Suit." See *Worcester Color Co.* v. *Henry Wood's Sons Co.* 105, 110.
"Survivors." See *Hall* v. *Hall*, 350, 353.
"Then living." See *Hall* v. *Hall*, 350, 353.
"Then remaining." See *Hall* v. *Hall*, 350, 353.

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Words (*continued*).

"Trustees." See *Pope* v. *Hinckley*, 323, 328.

"Usual outbuildings appurtenant." See *Riverbank Improvement Co.* v. *Bancroft*, 217, 220, 222.

"Whoever." See *Commonwealth* v. *Graustein & Co.* 38, 43.

WORKMEN'S COMPENSATION ACT.

1. A statute, providing that, in an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense that the employee was negligent, if not guilty of serious and wilful misconduct, or that the injury was caused by the negligence of a fellow employee, not guilty of serious and wilful misconduct, or that the employee had assumed the risk of such an injury, with an express provision that the act shall not apply to injuries sustained before it takes effect, violates no rights secured by the Constitution of this Commonwealth or by the Constitution of the United States. *Opinion of the Justices*, 607.
2. In a statute providing that, in an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense that the employee was negligent or that the injury was caused by the negligence of a fellow employee or that the employee had assumed the risk of such an injury, there is nothing unconstitutional in a provision that the provisions already mentioned shall not apply to domestic servants and farm laborers. *Ibid.*
3. In a statute providing a system of compensation for personal injuries received by employees in the course of their employment there is nothing unconstitutional in a provision that an employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer notice in writing that he claimed such right. *Ibid.*
4. A statute, which provides through the instrumentality of a corporation established by the act and the subscription of employers thereto a system of compensation to employees for personal injuries received by them in the course of their employment and not due to serious and wilful misconduct on their part, and which contains nothing compelling an employer to become a subscriber or compelling an employee to waive his right of action at common law and accept the compensation provided for him in the act, is not in violation of the Constitution of this Commonwealth or of the Fourteenth Amendment of the Constitution of the United States. *Ibid.*
5. In a statute providing a system of compensation for personal injuries received by employees in the course of their employment it is within the power of the Legislature to provide that no agreement by an employee to waive his rights to compensation under the act shall be valid. *Ibid.*
6. In a statute, which provides through the instrumentality of a corporation created by the act and the subscription of employers thereto a system of compensation to employees for personal injuries received by them in the course of their employment and not due to serious and wilful miscon-

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duct on their part, there is nothing unconstitutional in an additional provision that any liability insurance company authorized to do business in this Commonwealth shall have the same right as the corporation created by the act to insure the liability to pay the compensation provided for in the act, that a policy holder of such liability company shall be regarded as a subscriber so far as applicable within the meaning of the act, and that when any such company insures such payment of compensation it shall be subject to all the regulations and obligations imposed upon the corporation created by the act. *Opinion of the Justices*, 607.

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STATUTES CITED AND EXPOUNDED.

STATUTES OF THE UNITED STATES.

February 4, 1887, c. 104.	Interstate Commerce		602
March 2, 1889, c. 382.	"	"	602
February 10, 1891, c. 128.	"	"	602
February 8, 1895, c. 61.	"	"	602
February 19, 1903, c. 708.	"	"	602
June 29, 1906, c. 3591.	"	"	6

STATUTES OF MICHIGAN.

3 Mich. Comp. Laws (1897) §§ 8630–8641.	Divorce	288
——— ——— ——— § 8641.	"	290

PROVINCIAL STATUTES.

1692–1693, c. 4, § 1.	Tax	21
1694–1695, c. 2, § 4.	"	21
1715–1716, c. 11, § 2.	"	21
1740–1741, c. 8, § 2.	"	21
1742–1743, c. 31, § 2.	"	21
1745–1746, c. 1, § 2.	"	21
1746–1747, c. 1, § 3.	"	21
1747–1748, c. 1, § 3.	"	21
1757–1758, c. 2, § 3.	"	21
1759–1760, c. 2, § 3.	"	21
1767–1768, c. 8, § 3.	"	21
1769–1770, c. 1, § 3.	"	21
1773–1774, c. 14, § 3.	"	21
1780, c. 16, § 3.	"	21

STATUTES OF THE COMMONWEALTH.

1780, c. 43.	Tax	21
1781, cc. 16, 28.	"	21
1782, c. 65.	"	21
1783, c. 37, § 4.	"	362
1784, c. 25.	"	21

Digitized by Google

1785, c. 70, § 7.	Tax	94
—— c. 74.	"	21
1786, c. 67, § 1.	Betterments	302
1794, c. 12.	Bowdoin College	320
1795, c. 11.	Tax	21
1804, c. 144.	"	21
1810, c. 79.	"	21
1819, c. 86.	Separation Act	321
1820, c. 64.	Tax	21
1828, c. 143.	"	21
1833, c. 197.	Winnisimmet Company	3
1837, c. 211.	" "	4, 5
—— c. 212.	Aspinwall Wharf	4
1846, c. 203.	Way	548
1848, c. 166, § 5.	Tax	94
1851, c. 290.	Betterments	303, 306, 308
1862, c. 183, § 6.	Tax	94, 95
1864, c. 173.	Estates of Deceased Persons	461
1866, c. 273.	Employment of Children	492
1867, c. 302.	Easements	549
1871, c. 188.	Winnisimmet Company	2
—— c. 345.	" "	2, 6
1874, c. 375, § 8.	Tax	23
—— c. 388.	Betterments	306
1876, c. 52.	Employment of Children	492
1878, c. 214.	Tax	23
—— c. 266.	"	367
—— c. 266, § 1.	"	94
1882, c. 217, § 2.	"	23
1883, c. 224.	Employment of Children	493
—— c. 253.	Betterments	303
1884, c. 226.	"	331
1885, c. 222.	Employment of Children	493
1886, c. 231.	Tax	23
1887, c. 121.	Employment of Children	493
1888, c. 94.	Appeal	472, 473
—— c. 158.	Tax	23
—— c. 348.	Employment of Children	493
1889, c. 465.	Tax	23
1891, c. 425.	Collateral Legacies and Successions	188, 320, 322
—— —— § 18.	" " "	192, 321
1892, c. 352.	Employment of Children	493
1893, c. 407.	Metropolitan Park Commission	382
1894, c. 288.	" " "	382
1895, c. 153, § 2.	Exceptions	472
—— c. 305.	Metropolitan Park Commission	382
1896, c. 451.	Exceptions	472

Digitized by Google

1896, c. 483. Merrimac River Bridge 387
1897, c. 137. County Commissioners 478
—— c. 394. Parks and Parkways 331, 332 n.
1898, c. 170. Cambridge House of Correction 478
—— c. 467, §§ 1, 8. Charles River Bridge 387
—— c. 578. Street Railway 215
1899, c. 419, §§ 1, 2. Metropolitan Park Commission 382
—— c. 464, § 4. " " " 382
1900, c. 872, § 1. Appeals and Exceptions 472
—— c. 456. Fore River Bridge 387
1901, c. 197. Tax 116
—— c. 491. Mystic River Bridge 387
—— c. 519. Tax 115, 117
1902, c. 315, § 1. Automobile 28
—— c. 423. Tax 116
—— c. 443. " 121
—— c. 473. Collateral Legacies and Successions 192
—— —— § 1. " " " 188
—— c. 503. Betterments 331
1903, c. 222, § 1. Probate Jurisdiction 460
—— c. 276. Collateral Legacies and Successions 189
—— c. 391. Charles River Bridge 387
—— c. 415. Sales of Merchandise in Bulk 583
—— c. 437, §§ 52, 53. Business Corporation 111
—— c. 441. North River Bridge 387
—— c. 465. Charles River Dam 382
—— c. 473, §§ 4–6. Automobile 165
—— —— § 5. " 165, 171
—— —— § 8. " 28
1905, c. 267. School Attendance 491
—— c. 288. Land Court Appeals 548
—— c. 311, §§ 4, 7. Automobile 165
1906, c. 402, § 2. Charles River Basin 383
—— c. 412. Automobile 28
—— c. 463, Part I, § 63. Railroad 87, 101
—— —— Part II, § 245. " 495
—— —— Part III, §§ 52–54, 144, 145. Street Railway 214
—— —— —— § 157. " " 214 n., 216
—— c. 499, § 1. Employment of Children 495
1907, c. 290, § 1. Dissolved Corporation 111
—— —— § 2. " " 110, 111
—— c. 375. Railroad 530
—— c. 392. " 82, 101, 495
—— c. 428, § 4. Electric Railroad Companies 101
—— c. 563. Collateral Legacies and Successions 192
—— —— § 1. " " " 378, 460
1908, c. 305. Notice 555

Digitized by Google

1908, c. 643.	Milk	33, 35
1909, c. 236.	Judgment	154
—— c. 363.	Employer's Liability	495
—— c. 490, Part I, § 2.	Tax	457
—— —— —— § 5.	"	20 n.
—— —— —— —— cl. 8.	"	23
—— —— —— § 15.	"	122, 417
—— —— —— § 21.	"	118
—— —— —— § 23.	"	20 n.
—— —— —— —— cl. 5.	"	22
—— —— —— § 46.	"	458
—— —— Part II, § 1.	"	119
—— —— —— §§ 14, 43.	"	118
—— —— —— §§ 39, 41, 42.	"	117
—— —— —— § 44.	"	118, 121
—— —— —— § 45.	"	95 n., 115
—— —— —— §§ 46, 61, 62.	"	121
—— —— —— § 50.	"	120, 122
—— —— —— § 64.	"	419
—— —— —— § 89, No. 14.	"	115
—— —— Part IV, § 1.	"	378, 379, 480
—— c. 514, § 56.	Employment of Children	491
—— —— § 61.	School Certificate	492
—— —— § 74.	Elevators	170
—— —— § 127.	Employer's Liability	86
—— —— —— cl. 1.	" "	81
—— —— —— cl. 2.	" "	82
—— —— § 128.	" "	82
—— —— § 143.	" "	495
—— c. 527, §§ 2, 4, 10.	Collateral Legacies and Successions	192
—— c. 534, §§ 1, 33.	Motor Vehicles	28
—— —— § 16.	" "	27, 28
1910, c. 560, §§ 2, 8.	Land Court	548
1911, c. 310.	Employment of Children	492
—— c. 370.	Tax	12, 116
—— c. 751, Part I, § 1.	Workmen's Compensation Act	609
—— —— —— § 2.	" " "	610
—— —— —— § 5.	" " "	611
—— —— Part II, § 2.	" " "	610
—— —— Part III, §§ 4, 7.	" " "	611

Revised Statutes.

c. 7, § 5, cl. 2.	Tax	23, 321
—— § 10, cl. 5.	"	22
c. 8, § 31.	"	94
c. 24, §§ 48–53.	Way	303, 304
—— § 48.	"	306

Digitized by Google

c. 24, § 50.	Way	304
c. 59, § 28.	Conveyance	362
c. 60, § 28.	Easements	549

General Statutes.

c. 11, § 5, cl. 3.	Tax	23
—— § 12, cl. 5.	"	22
c. 12, § 35.	"	94
c. 43, § 17.	Way	314
—— §§ 53–58.	"	303
—— § 82.	"	548
c. 90, § 34.	Easements	549

Public Statutes.

c. 11, § 5, cl. 3.	Tax	23
—— § 20, cl. 5.	"	22
c. 48.	Employment of Children	493
c. 49, §§ 20–25.	Way	303
—— § 94.	"	548, 549
c. 113.	Street Railway	215
c. 122, § 3.	Easements	549
c. 150, § 16.	Supreme Judicial Court	472
c. 151, § 20.	" " "	472
c. 176.	Settlement of Title to Land	18

Revised Laws.

c. 8, § 5.	Construction of Statutes	43
c. 12, § 2.	Tax	457
—— § 5, cl. 3.		20, 23, 320
—— § 15.	"	122
—— § 21.	"	118
—— § 23, cl. 5.	"	20, 22, 23
—— § 46.	"	458
c. 13, § 1.	"	117, 119
—— § 14.	"	118
—— §§ 38, 40, 41.	"	117
—— § 43.	"	118, 121
—— § 44.	"	95, 115
—— § 45.	"	116, 121
—— § 49.	"	120, 122
—— § 58, cl. 1.	"	296
—— §§ 70–72.	"	367, 368
—— § 72.	"	366
—— § 87.	"	95
—— —— No. 14.	"	115, 116, 117
c. 15.	Collateral Legacies and Successions	320
c. 25, § 97.	Towns and Town Officers	95

Digitized by Google

c. 27, § 6.	Municipal Indebtedness 263
—— § 9.	" " 265
c. 42, § 1.	Public Schools 119
c. 44, § 2.	School Attendance 119
c. 48, § 17.	Way 303, 308, 314
—— § 18.	" 303, 308
—— § 19.	" 308
—— §§ 20–22.	" 314
—— §§ 20–23.	" 301
—— §§ 20–24.	" 303, 304
—— § 21.	" 309
—— § 22.	" 304
—— §§ 22–23.	" 310
—— § 29.	" 314
—— § 98.	" 548
c. 50, § 11.	Betterments 331
c. 54, § 1.	Law of the Road 163
—— § 3.	" " " 169, 496
c. 56, § 55.	Milk 35, 37, 39
—— §§ 59, 63.	" 37
c. 74, § 1, cl. 2.	Statute of Frauds 422
c. 98, § 17.	Lord's Day 168
c. 106, § 28.	Employment of Children 490
——— § 71.	Employer's Liability 196
——— —— cl. 1.	" " 65
——— —— cl. 2.	" " 54
——— §§ 71–74.	" " 196
c. 111, §§ 149 *et seq.*	Railroad 306
——— § 153.	" 306
——— § 267.	" 101
c. 112, § 100.	Street Railway 214 n.
c. 127, § 4.	Conveyance 362
c. 130, § 2.	Easements 547
——— § 3.	" 549
c. 134, § 20.	Real Property 221
c. 135, § 3.	Wills 184
c. 139, § 8.	Executors and Administrators 457
c. 141, § 24.	Legacies and Distributive Shares 438
——— § 26.	" " " 394
c. 148, §§ 15–17.	Award and Compromise 460, 461, 462
c. 150, § 19.	Estates of Deceased Persons 588
——— § 29.	Executors and Administrators Accounts 418
c. 151, § 30.	Marriage 119
c. 159, § 3, cl. 7.	Equity Jurisdiction 248, 597
——— § 12.	" " 358
——— §§ 19, 29.	Final Decree 473
c. 167, § 30.	Attachment 371

Digitized by Google

c. 167, § 119.	Attachment	372
——— § 121.	"	371, 372
c. 171, § 1.	Personal Actions	282
——— § 2.	" "	530
c. 173, § 115.	Judgment	471, 472, 473, 474
c. 175, § 66.	Declarations of Deceased Persons	550
c. 176, § 28.	Juror	414
c. 177, § 8.	Judgment	396
c. 178, §§ 4, 31.	Levy of Execution	370
c. 182, §§ 1–5.	Settlement of Title to Land	13
c. 202, § 1.	Limitation of Actions	96
c. 207, § 15.	Assault	403
c. 215, § 1.	Felony	403
c. 218, § 35.	Indictment	42
c. 227.	Repeal of Statute	115

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